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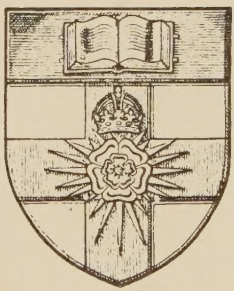

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THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

LEMMON *v.* WEBB.

C. A.

1894

KEKEWICH, J.

Feb. 8.

C. A.

April 24, 25, 26, 27; *May* 4.

[1893 L. 512.]

Trees—Nuisance—Trees overhanging Neighbour's Ground.

Large boughs of trees standing on *L.'s* land had for more than twenty years overhung *W.'s* land. *W.*, without giving any notice to *L.*, cut off the boughs to the boundary line. *L.* brought his action, alleging that *W.* had no right at all to cut off anything which had overhung his ground more than twenty years, and, that if *W.* was entitled to cut the branches at all, he was not entitled to do so without notice. *Kekewich*, J., held that *W.* was entitled to lop the branches, but not without notice to *L.*, and that the cutting, therefore, was improper:—

Held, on appeal, that *W.* was entitled to lop the branches which overhung his land, though they had done so for more than twenty years; that, as he did not go on *L.'s* land for the purpose, notice was not necessary; and that the action must be dismissed.

THE Plaintiff and Defendant were adjoining landowners. On the Plaintiff's land, near the boundary between the two properties, were a number of large old trees, branches from which hung over the Defendant's land. The Defendant, without giving any notice to the Plaintiff, cut off a number of large branches to the boundary line. A question was raised whether he had not cut some of them beyond the line; but the Court considered it not to be made out that he had. The Plaintiff commenced this action, claiming a declaration that the Defendant was not entitled to

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cut any branches of the Plaintiff's trees which overhung the Defendant's land when such overhanging had continued many years, and that he was only entitled to cut recent growth; and further or in the alternative that the Defendant was not entitled to enter upon or over the Plaintiff's land for the purpose of cutting overhanging branches, either absolutely or, at all events, not until after due notice to the Plaintiff. The Plaintiff further claimed an injunction to restrain the Defendant from cutting contrary to the declaration aforesaid, and damages for trespass and wrongful cutting.

It was not disputed that the branches cut off had overhung the Defendant's land for much more than twenty years. It did not appear that the Defendant had gone upon the Plaintiff's land for the purpose of cutting them.

The action was heard before Mr. Justice *Kekewich* on the 8th of February, 1894.

Warmington, Q.C., and *R. F. Norton*, for the Plaintiff:—

Upon the evidence, we submit that the Defendant has been guilty of trespass for which an action will lie. The law is clear that where a nuisance exists, which has not been created by the person on whose property it is, a neighbour cannot abate such nuisance without first giving notice of his intention so to do: see *Penruddock's Case* (1), followed in more modern times in *Jones* v. *Williams* (2) and *Earl of Lonsdale* v. *Nelson* (3). In the last-mentioned case, Mr. Justice *Best* (4) clearly points out the distinction between nuisances of commission, which may be abated by the injured party without notice, and nuisances of omission, which cannot be abated without notice, unless, as in the case of overhanging branches of trees, "security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen, to remedy it." So in *Jones* v. *Williams* it was held that "a party has no right to enter upon the land of another in order to abate a nuisance of filth, without previous notice or request to the owner of the land to remove it, unless it appear that the latter

(1) 5 Rep. 100 b.
(2) 11 M. & W. 176.
(3) 2 B. & C. 302.
(4) Ibid. 311.

was the original wrongdoer, by placing it there, or that it arises from a default in the performance of some duty or obligation cast upon him by law, or that the nuisance is immediately dangerous to life or health," and it is there stated that a notice is requisite in all cases of nuisance by omission. In that case Baron *Parke* referred to *Penruddock's Case* (1), and observed (2) that "the judgment in that case was affirmed on error; and in the King's Bench, on the argument, the Judges of that Court agreed that the nuisance might be abated, without suit, in the hands of the feoffee—that is, as it should seem, with notice"; and he cited *Jenkins*, Sixth Century (3), as being in all probability a reference to *Penruddock's Case*.

In this case it is plain that the boughs which were cut were in no sense dangerous to life or health, and, therefore, the principle of the authorities cited applies in full force. No case can be cited in which an owner of land has been held to be justified in cutting trees overhanging his property which had overhung for more than twenty years.

[KEKEWICH, J., referred to *Garrett* on Nuisances (4).]

Suppose there had been a projection of a room from a house which had existed for twenty years, such a projection might be a nuisance, but, having been submitted to for twenty years, it could not be removed; and the same principle must apply to the case of overhanging trees.

Marten, Q.C., and *Job Bradford*, for the Defendant:—

Dismissing from consideration the question of trespass to the Plaintiff's land, which is of so trifling a character that the Court will not pay regard to it, the Defendant rests his case on the common law right which every owner of land has to cut branches which project over his land from the land of another person. The question is not one of nuisance, but of right, according to the familiar maxim, "*Cujus est solum ejus est usque ad cœlum.*" In the pleadings the case is treated as one of easement; but no such easement has ever been recognised in law, nor can it exist,

(1) 5 Rep. 100 b.
(2) 11 M. & W. 182.
(3) Page 260, case 57.
(4) Page 314.

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having regard to the constantly changing character of trees which overhang by gradual growth.

[KEKEWICH, J.:—Nobody says it is an easement.]

The common law right to cut overhanging timber is clear: *Norris* v. *Baker* (1); *Viner's* Abridgment (2).

[KEKEWICH, J.:—There is no doubt about it.]

Then as to the notice. On behalf of the Defendant, we say that no notice was requisite. *Penruddock's Case* (3) has no application here. It related to a nuisance on the neighbour's land, which rests on entirely different considerations. What may justify a man in making an incursion into another's land is one thing; what a man may do on his own land is quite another thing. In each of the other cases cited of *Jones* v. *Williams* (4) and *Earl of Lonsdale* v. *Nelson* (5), reference is made to the cutting of trees, and in the last-mentioned case (6) Mr. Justice *Best* says: "There is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees, is a most unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred." So that the cutting of the branches of trees is dealt with, and put on a different footing from the case of a notice for the purpose of abating a nuisance. It is not necessary in such a case to consider whether the branches are a source of danger; but if it were necessary, we say that there is sufficient evidence here to shew that there was, from the situation of the property, a probability that immediate danger might arise. The acts of the Defendant were done in the exercise of his rights as owner for the purpose of protecting his farm buildings and the live stock therein, which were, in the event of a storm, liable to be seriously injured by the fall of the branches.

(1) 1 Roll. 393; S.C. 3 Bulst. 196, *sub nom. Morrice* v. *Baker*.
(2) Vol. xx. p. 418, "Trees" (E).
(3) 5 Rep. 100 b.
(4) 11 M. & W. 176.
(5) 2 B. & C. 302.
(6) 2 B. & C. 311.

[Counsel for the Plaintiff having, in answer to his Lordship, expressed themselves content with judgment for moderate damages and costs, no reply was called for.]

KEKEWICH, J.:—

Given two adjoining owners with a hedge dividing their properties and belonging to one of such owners, that hedge containing trees, some of the branches of which overhang the land of the other, what is the right of that other as regards those branches, which certainly interfere with his property, that is to say, with something between heaven and earth belonging to him? The question is one of law, decided, at any rate, fifty years ago, and really long before that. As regards *Penruddock's Case* (1), it will suffice to refer to the statement of it in the judgment of Baron *Parke* in *Jones* v. *Williams* (2), where he apparently identifies the case in the reports with *Jenkins'* Sixth Century (3). In *Jones* v. *Williams*, and also in the other case of *Earl of Lonsdale* v. *Nelson* (4), which is twenty years before that, making seventy years ago, there is a clear distinction drawn between nuisance of commission and nuisance of omission. It is argued on behalf of the Defendant that this is not a nuisance at all. In many senses it is not, but it is so called in all the authorities, and it is too late for counsel or judge to say that a neighbour's tree overhanging my land is not a nuisance. It is a nuisance of omission—that is to say, it is negligence on the part of the owner of the tree to allow the branches to overhang the land. The cases shew that in that event the person suffering the nuisance is entitled to abate it, but on giving notice. Of course that means reasonable notice—the object, I have no doubt, though I do not find it stated in the books, being that the owner of the tree should have a fair opportunity of abating the nuisance while preserving his own property. It is argued that the Plaintiff cannot complain of boughs being cut which he cannot see from his own house, and that the cutting does not interfere with his amenities, and so on. But the tree is his. He must not allow it to interfere with his neighbour's rights. To say a

(1) 5 Rep. 100 b.
(2) 11 M. & W. 176.
(3) Page 260, case 57.
(4) 2 B. & C. 302.

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man has not an interest in his oak tree sixty, seventy, or one hundred years old, or at all events such an interest as entitles him at any rate to have an opportunity of saying how a bough should be cut, and when it should be cut, is a somewhat strong assertion, and not consistent with either law or common sense. He must have that opportunity. In this case the opportunity was not given, and there really is no justification for not giving it. Lord *Abinger*, in a few remarks in the case of *Jones* v. *Williams* (1)—and the law is stated to the same effect elsewhere—says (2): "It might be necessary in some cases, where there was such immediate danger to life or health as to render it unsafe to wait, to remove without notice." And I suppose there might be fairly added to that, danger to property, which has been argued here. There is no suggestion here of danger to life or health, but it is said that these boughs were dangerous to cows. I cannot so find. The obstruction to the bridle-path, though it cannot be forgotten, I pass over in this connection, because that is simply a matter of inconvenience. What was the danger? Put aside any such extraordinary tempest as according to the cases on that not very clear branch of the law might be regarded as the act of God, and take the ordinary incidents of winter weather affecting trees of this kind, what real apprehension was there of these branches being broken down? There really was none. It is not suggested that there was any. But fortunately, in order to come to the rescue of the Defendant's case, a bough fell in the following August, and so it is argued that, because a branch heavily laden with foliage in August fell, therefore other branches, which were not laden with foliage, might possibly have fallen in the following January. But that does not strike one as a very practical argument. There really was no imminent danger. Why, then, this sudden determination on the part of the Defendant? The trees have stood there for a very long time—how long we do not know; but the Defendant himself confessed to having regarded them as more or less a nuisance or interference for fifteen years, and his own case is that, by gradual growth the boughs have, by slow degrees, become longer, heavier, more obstructive, and more dangerous. Well, if he has

(1) 11 M. & W. 176. (2) 11 M. & W. 182.

waited, I will not say for fifteen years, but for two or three years, surely he could have waited for a week, so as to give the Plaintiff an opportunity of doing what, on proper notice, it seems to me, it would have been his bounden duty to do. I give the Defendant credit for what he stated, that he did not act as he did because he was vexed with the Plaintiff on other matters, and I will give him credit that he did not wish to do an unneighbourly thing; but, if he had taken the further precaution of being advised by somebody else instead of advising himself, I think he would not have acted as he did. I do not wish to impute to him anything more than an unfortunate reliance on his own judgment. But in his defence he has set up a claim to the right. When his attention is called to it, when he is told he should have given notice, he really stands by his claim. Of course, I know the Plaintiff's case is put a good deal too high, and I know also that there is this question of trespass in cutting the trees, which I pass by because I do not think it is important; but even so the Defendant might very easily have taken the line which he now takes in the witness-box, when he says that if it had occurred to him he would have given notice. However, he did not do so. He says he does not threaten or intend to cut other trees, but he reserves his legal rights—that is to say, he puts me to decide the question, and I decide it against him. Having regard to what he has said, and that there is no evidence of an intention to cut anything else, though I am aware a complaint has been made of other boughs, I think I ought not to grant any injunction which might be a reflection on the Defendant's honesty. I do not think there is any occasion for a declaration, and the justice of the case will be met by ordering the Defendant to pay £5 damages, and the costs of the action in the High Court.

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The Defendant appealed. The appeal came on for hearing on the 24th of April, 1894.

Marten, Q.C., and *Job Bradford*, for the appeal:—

The principles as to abating nuisances without notice are

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explained in *Jones* v. *Williams* (1). The case generally referred to as to lopping trees which overhang is *Norris* v. *Baker* (2); nothing is there said about notice.

[LINDLEY, L.J.:—The question whether notice is necessary may turn on the question whether the overhanging of trees is a trespass or a nuisance.]

It is laid down in *Penruddock's Case* (3) that a person who suffers from a nuisance on his neighbour's land may enter and abate it without notice if the neighbour himself created the nuisance, but must give notice if it was created by the neighbour's predecessor in title. This is notice only to justify entering on the neighbouring land, and the rule has no application where there is no such entry. The right to cut overhanging timber has been long established: *Norris* v. *Baker* (4), and nothing is there said about giving notice. In *Jones* v. *Williams* it was decided that overhanging eaves erected by a former owner could not be removed by the owner of the ground overhung without notice. But an overhanging building stands on quite a different footing from overhanging trees, for length of time would give a title to it. The encroachment by building is a trespass, not a nuisance. In *Earl of Lonsdale* v. *Nelson* (5) *Best*, J. (6), puts the lopping of overhanging trees on quite a different footing from other cases of abating a nuisance, and says expressly that they may be lopped without notice.

[LINDLEY, L.J., referred to *Brooke's* Abr. "Nusans" (7), and observed that it said nothing about notice.]

It would impose a heavy burden on the person whose land is overhung to require him to give notice; he might have great difficulty in ascertaining the proper person to receive notice. The judgment of Lord *Abinger* in *Jones* v. *Williams* (8) is in our favour on the point of notice.

[LOPES, L.J., suggested that Lord *Abinger* might be referring

(1) 11 M. & W. 176.
(2) 1 Roll. 393; see observations of *Croke*, J., at p. 394.
(3) 5 Rep. 100 b.
(4) 1 Roll. 393.
(5) 2 B. & C. 302.
(6) Ibid. 311.
(7) Vol. ii. p. 105, pl. 28.
(8) 11 M. & W. 176; 12 L. J. (Ex.) 249.

to cases of immediate danger, where something must be done at once.

KAY, L.J.:—Why should a difference be made between the overhanging of trees and other nuisances?]

They are different in character; they are growing nuisances. The law is summed up in our favour in *Gale* on Easements (1), and in *Pickering* v. *Rudd* (2) the right to proceed without notice is recognised. The form of plea justifying the cutting of overhanging branches—*Chitty* on Pleading (3)—proceeds on this view.

Warmington, Q.C., and *R. F. Norton*, for the Plaintiff:—

We say first that the Defendant committed a trespass on the Plaintiff's property. If a house is built overhanging a neighbour's land, a right is acquired to the space by lapse of time; so if boughs overhang the Defendant's land for more than twenty years, they have a right to be there. The trees are the Plaintiff's property throughout, and the Defendant has trespassed by cutting them.

[KAY, L.J.:—Your argument goes too far: it makes it unlawful to cut the trees at all—even with notice.]

We submit that there cannot be any right to cut off anything which has occupied a space over the Defendant's land for more than twenty years.

[LOPES, L.J.:—Then you say that a man whose land has been overhung for twenty years has no remedy?]

Why should he? If sewage had been sent down for twenty years he would have none.

[LINDLEY, L.J.:—You send the sewage; you do not make the tree overhang.]

But if we are wrong there, still notice is necessary, for the tree is part of the Plaintiff's land, and any interference with it is an act of trespass.

The foundation of the complaint is that there has been a

(1) 3rd Ed. p. 419. (2) 1 Stark. 56.
(3) 7th Ed. vol. iii. p. 364.

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nuisance, not a trespass; now the person complaining has no right to abate the nuisance without remonstrance and notice unless there is some special urgency, or unless the offender has done some act of commission or culpable negligence. Mere omission to prevent the nuisance is not enough to take away his right to notice: *Blackstone's* Commentaries (1); *Brooke's* Abr. "Nusans" (2); *Pickering* v. *Rudd* (3); *Holder* v. *Coates* (4); *Earl of Lonsdale* v. *Nelson* (5); *Jones* v. *Williams* (6); *Penruddock's Case* (7). In the present case there is no act of commission or negligence. The trees were not planted by the Plaintiff, but by his predecessor in title. When the Plaintiff bought the property, the trees were just as they are now: they have been there for fifty years. There is evidence that the Defendant has himself committed a trespass: he has cut the boughs within the Plaintiff's boundary, and placed the ladder on the Plaintiff's ground.

Marten, in reply:—

Trees stand on a peculiar footing. The owner is not bound to cut them so as to prevent their overhanging his neighbour's land, and there is no trace in the books of his incurring any liability by not doing so; but all the encroachments which the tree makes are by sufferance; so no right is acquired, and the adjoining owner is entitled to remove them. No analogy can be drawn between a tree and an artificial structure; the whole of the tree, including the roots, belongs to the person in whose land it grows: *Vin.* Ab. (8); *Masters* v. *Pollie* (9). The right to cut overhanging branches was treated as clear in *Crowhurst* v. *Burial Board of Amersham* (10), and nothing is said about notice. [The cases of *Wandsworth Board of Works* v. *United Telephone Company* (11), *Burling* v. *Read* (12), and *Chadwick* v. *Trower* (13), were also referred to.]

(1) 16th Ed. Bk. iii. ch. i. p. 5.
(2) Vol. ii. p. 105, pl. 28.
(3) 4 Camp. 219; S.C. 1 Stark. 56.
(4) Mood. & M. 112.
(5) 2 B. & C. 302.
(6) 11 M. & W. 176.
(7) 5 Rep. 100 b.
(8) Vol. xx. p. 418, "Trees."
(9) 2 Roll. 141.
(10) 4 Ex. D. 5.
(11) 13 Q. B. D. 904.
(12) 11 Q. B. 904.
(13) 6 Bing. N. C. 1.

1894. May 8. LINDLEY, L.J.:—

The Plaintiff and the Defendant in this case are adjoining landowners. Some old trees situate on the Plaintiff's land had branches which projected over the Defendant's land. The Defendant cut off so much of these branches as projected over his land, and he did so without going on to the Plaintiff's land, and without previous notice to him. The question is whether the Defendant was justified in so doing. Mr. Justice *Kekewich* thought not, and gave the Plaintiff judgment for £5 and costs, and from this judgment the Defendant has appealed.

There is some controversy as to whether the Defendant did not cut rather more than he himself says he did, and more than he seeks to justify. But the evidence is clear that he certainly did not intend to cut more than so much of the branches as overhung his land; and the evidence is not sufficient to prove that he did in fact cut more. Having noticed this matter, I pass it over without further comment, for the action was not brought for such a trumpery purpose as to obtain damages for the wrongful cutting of two or three inches too much. The action was brought to obtain a declaration that the Defendant had no right to cut the branches at all, or, at all events, no right to cut them without previous notice to the Plaintiff and a request to him to cut them, and a non-compliance by the Plaintiff with that request.

It was contended on behalf of the Plaintiff that, having regard to the age of the trees and of the projecting branches, he had acquired a right to the exclusive possession of so much of the space above the Defendant's soil as the branches actually filled, and that either under the *Statute of Limitations* or by prescription the Plaintiff had a right to keep the branches when they had grown. It was contended that if a man erected on his own land something which projected over his neighbour's land, and it remained undisturbed for a sufficient length of time, his neighbour could not remove it nor maintain any action in respect of it. This is true. But to plant a tree on one's own land infringes no rights, and, if the tree grows over the soil of another, I cannot discover that any action lies for the encroachment unless damage can be proved. I can find no authority for the proposition that

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an action of trespass would lie in such a case, and it is plain that Lord *Ellenborough* did not think it would: see *Pickering* v. *Rudd* (1). According to our law the owner of a tree which gradually grows over his neighbour's land is not regarded as insensibly and by slow degrees acquiring a title to the space into which its branches gradually grow. This is the view taken in *Gale* on Easements (2), to which reference will be made presently. Considering that no title is acquired to the space occupied by new wood, and that new wood not only lengthens but thickens old wood, and that new wood gradually formed over old wood cannot practically be removed as it grows, and considering the flexibility of branches and their constant motion, it is plain that the analogy sought to be established between an artificial building or projection hanging over a man's land and a branch of a tree is not sufficiently close to serve any useful purpose. The argument to which I am referring had the charm of novelty; but it is quite inconsistent with the authorities to which I will refer presently, and no Court can introduce by judicial decision a perfectly new mode of acquiring a title to land or to a portion of the space above it.

The right of an owner of land to cut away the boughs of trees which overhang it, although those trees are not his, is too clear to be disputed. This has been declared to be the law for centuries: see *Brooke's* Abr. "Nusans" (3); *Norris* v. *Baker* (4); *Pickering* v. *Rudd* (5); *Crowhurst* v. *Burial Board of Amersham* (6)—and there is no trace of the age of the tree or its branches being a material circumstance for consideration. Nor did Mr. Justice *Kekewich* intimate any doubt upon the law up to this point. He, however, held that notice ought to be given to the owner of the tree before it was interfered with; and the real question is whether notice is required by law. The authorities to which I have referred do not allude to the necessity of notice. In *Pickering* v. *Rudd*, which was an action for cutting the plaintiff's Virginian creeper, the plea contained no averment of notice, and the plaintiff did not demur, but new assigned and

(1) 4 Camp. 219.
(2) 6th Ed. p. 461.
(3) Vol. ii. p. 105, pl. 28.
(4) 1 Roll. 393.
(5) 4 Camp. 219; 1 Stark. 56.
(6) 4 Ex. D. 5.

alleged an excessive cutting. Lord *Ellenborough* held that the only question was whether the defendant had exceeded his right by cutting too much. Again, in *Chitty* on Pleading (1), a form of a plea justifying the lopping of overhanging branches is given, and there is no averment of notice to the owner of the tree. In the 7th edition, vol. 3, p. 364, such an averment is introduced, and reference is made to *Jones* v. *Williams* (2). *Jones* v. *Williams* was not a case of cutting trees, but it is the leading authority on the right to abate nuisances without notice; and it was decided that a person who suffers from a nuisance on another person's land can enter upon that land and abate that nuisance without notice if the person in possession of the land himself created the nuisance, or in case of emergency, but that in other cases notice to the person in possession and a request to him to abate the nuisance and non-compliance with that request are necessary to justify the entry and the abatement of the nuisance by the person aggrieved by it. This is what the case decided, and so far the decision only applies to what one man may do on another man's land; it does not shew what a man may or may not do on his own land. But in *Jones* v. *Williams*, Baron *Parke*, who delivered the judgment of the Court, referred to a case in *Jenkins* (3), and to *Penruddock's Case* (4), as authorities for the proposition that an owner of land cannot without notice remove the overhanging eaves of a neighbour's house erected by a former owner through whom the neighbour had acquired title by feoffment. The reason of this doctrine is not explained.

But, assuming it to be correct as regards an overhanging house or eaves, it does not follow that it applies to the overhanging branches of a tree. The judgment of Mr. Justice *Best* in *Earl of Lonsdale* v. *Nelson* (5) is explicit, that overhanging trees may be lopped by the owner of land over which they hang without notice. Mr. Justice *Best* says the right so to lop them is an exception to the general rule which requires notice before a nuisance, not created by the owner of what creates it, can be abated by a person injured by it. He is not alluding to a case

(1) 7th Ed. vol. iii. p. 364.
(2) 11 M. & W. 176.
(3) Page 260, case 57.
(4) 5 Rep. 100 b.
(5) 2 B. & C. 311.

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of emergency, for in such a case no notice need ever be given. He refers to such cases afterwards. His Lordship says: "Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the person who committed them; but there is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees, is a most unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred."

What I have above said respecting the right to cut branches is equally true with respect to the right to cut roots (see *Gale* on Easements (1)), where the learned writer says: "There appears to be no authority in the English law, that, in the absence of express stipulation, an easement can be acquired by user, to compel a man to submit to the penetration of his land by the roots of a tree planted in his neighbour's soil. The principal objections to the acquisition of such an easement consist in the secrecy of the mode of enjoyment, and the perpetual change in the quantity of inconvenience imposed by it. Supposing no easement to exist, there seems nothing to take this out of the ordinary rule, that a man may abate any encroachment upon his property, and therefore that he may cut the roots of a tree so encroaching, in the same manner that he may the overhanging branches."

The law on the subject is, in my opinion, as follows: The owner of a tree has no right to prevent a person lawfully in possession of land into or over which its roots or branches have grown from cutting away so much of them as projects into or over his land, and the owner of the tree is not entitled to notice unless his land is entered in order to effect such cutting. However old the roots or branches may be, they may be cut without notice, subject to the same condition. The right of an owner or occupier of land to free it from such obstructions is not restricted by the necessity of giving notice, so long as he con-

(1) 6th Ed. p. 461.

fines himself and his operations to his own land, including the space vertically above and below its surface.

The Defendant contended that he was justified in cutting the Plaintiff's trees because they were in imminent danger of falling; but this is not proved, and my judgment is not based on grounds of urgency.

The appeal, therefore, must be allowed, and the Appellant must have the costs of the appeal. Judgment must be entered for the Defendant; but, having regard to the obscurity of the law as to notice and to the very unneighbourly conduct of the Defendant, there will be no order as to the costs of the action.

LOPES, L.J.:—

That the Defendant had a right to cut the boughs of the Plaintiff's trees which projected over his land is beyond question; but whether he was justified in so doing without giving the Plaintiff previous notice is a matter that requires consideration.

I am of opinion that he was.

It was argued that, the branches of the Plaintiff's trees having for a long time overhung the land of the Defendant, the Plaintiff had acquired a right to the occupation of so much of the space as was covered by the projecting boughs, either by the *Statute of Limitations* or by prescription.

There is no authority for such a contention, and in no previous case (of which there are many) where the question of overhanging boughs has been considered was it ever suggested.

In *Pickering* v. *Rudd* (1) Lord *Ellenborough* said: "Whether the action may be maintained cannot depend upon the length of time for which the superincumbent air is invaded."

And, again (*Gale* on Easements (2)): "There appears to be no authority in the English law, that, in the absence of express stipulation, an easement can be acquired by user, to compel a man to submit to the penetration of his land by the roots of a tree planted in his neighbour's soil. The principal objections to the acquisition of such an easement consist in the secrecy of the mode of enjoyment, and the perpetual change in the quantity of inconvenience imposed by it."

(1) 4 Camp. 221. (2) 6th Ed. p. 461.

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I assume, therefore, as no easement exists, and as no right is acquired under the *Statute of Limitations*, that there is nothing to take the case of encroaching trees out of the ordinary rule, that a man may abate any encroachment upon his property, and that his right to cut the branches or roots projecting into his land is incontestable. But can this be done without previous notice to the person to whom the offending tree belongs?

I answer the question in the affirmative. In my judgment, the adjoining owner is, without any previous notice, entitled to cut as much of the tree as encroaches upon his land (whether it be branches or roots), provided in so doing he does not enter or trespass on the land of the owner of the tree, and confines himself to his own land.

There is direct authority to this effect. *Pickering* v. *Rudd* (1) was (amongst other things) an action for breaking, lopping, and damaging a Virginian creeper which grew on the plaintiff's garden, and spread itself over the defendant's house. The defendant cut away that portion of the creeper which was over his house without touching the surface of the plaintiff's premises. The defendant justified the cutting on the ground that the creeper was unlawfully spreading over his house, and that he removed it because it was an encumbrance on his premises; the plaintiff replied that the defendant had used greater force than was necessary. There was no suggestion that previous notice to the plaintiff was necessary before the defendant was justified in cutting the creeper. Lord *Ellenborough* says: "The defendant justifies the removal of the tree as being noxious to his premises; the plaintiff, by his replication, admits it to have been mischievous to some extent, and the issue is, whether the defendant used more force and violence, and did more damage to the tree than was necessary. The plaintiff admits a breaking to be necessary, and therefore it cannot now be drawn into question, whether a breaking was necessary or not."

There are observations in the judgment of Mr. Justice *Best* in *Earl of Lonsdale* v. *Nelson* (2) which strongly confirm the view I take with regard to the non-necessity of notice. The learned Judge is drawing a distinction between nuisances caused by an

(1) 1 Stark. 56, 58. (2) 2 B. & C. 311.

act of commission and those caused by omission. He says: "Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the person who committed them; but there is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them." And again: "The permitting these branches to extend so far beyond the soil of the owner of the trees, is a most unequivocal act of negligence, which distinguishes this case from most of the other cases that have occurred." Mr. Justice *Best* clearly does not consider any notice necessary in the case of overhanging branches.

I thought at first the learned Judge was referring to cases where there was danger to life or property—cases of emergency; but that is not so, for his subsequent remarks shew that he considers notice unnecessary in all cases of nuisances arising from omission if there is any emergency.

Jones v. *Williams* (1) was relied upon by the Plaintiff; but in that case the defendant entered upon the land of the plaintiff, which distinguishes it from the case now under consideration.

In that case it was held that a party has no right to enter upon the land of another in order to abate a nuisance of filth without a previous notice to the owner of the land to remove it, unless it appears that the latter was the original wrong-doer by placing it there, or that it arises from a default in the performance of some duty or obligation cast upon him by law, or that the nuisance is immediately dangerous to life or health.

The case of trees was not noticed in the judgment; but it is to be observed that Mr. (afterwards Lord Chief Justice) *Erle*, who argued for the plaintiff, at the end of his argument says: "The only case in which, according to the authorities, a notice or request is unnecessary, is that of trees overhanging a highway; the reason being, that any person may lawfully stand there to cut them."

The distinction, in my judgment, is this: A man may without previous notice cut the boughs of his neighbour's trees which

(1) 11 M. & W. 176.

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overhang his land, if he can do so without trespassing on his neighbour's land; but he cannot justify a trespass on another's land for the purpose of cutting boughs or roots projecting into his own land without previous notice.

It was suggested in this case that the boughs could not have been cut without some trivial trespass on the Plaintiff's land; but if there was any trespass—which is doubtful—it was unintentional, and of the slightest kind. The action was not brought in respect of any such trespass, but in order to test the right to cut the trees.

However, as there is always some risk of committing a trespass in removing overhanging boughs, it is a wise precaution to give notice.

The Appellant will have the costs of the appeal; but no costs below will be given.

KAY, L.J.:—

This is an action for damages for cutting boughs off the Plaintiff's trees. The trees are large oaks and elms of great age, and the boughs overhung the land of the Defendant. They were cut off by the Defendant without any previous notice to the Plaintiff.

What is the legal position when trees growing on the land of *A.* extend their roots and boughs into and over the adjoining land of *B.*? It was argued that it was the same as if *A.* had built a house on the edge of his own land with cellars within the land of *B.*, and a projecting upper storey extending over *B.'s* land. But in that case *B.* might bring against *A.* an action of trespass or ejectment. Would trespass or ejectment lie against the owner of the tree?

In the case of the house there is an occupation by *A.* of *B.'s* land to the extent of the encroachment, and this by lapse of time may grow into a right, and in such a case by the ordinary rule an action will lie without any proof of damage. Is the extension by natural growth of the roots or boughs of a tree into and over the land of another an occupation of that land which can become a right by lapse of time?

Or is this encroachment simply a nuisance, and, if so, can it

be abated by the owner of the land encroached on? If it can, must he before abating it give notice to the owner of the tree?

It is argued that when the boughs or roots can be cut without entering upon the land of the owner of the tree notice should not be necessary. The owner of the land encroached upon has a right to use his own land either by digging in the soil or by building upon it, and if there be roots or boughs in the way he should be allowed to remove them without notice to any one.

On the other hand, it is said notice is necessary in all cases before a nuisance can be removed, except when the occupier of the adjoining land has himself caused the nuisance, or except when an emergency happens and there is danger to life or health or property and no time to give notice. It may be that roots and boughs may be cut without entering upon the adjoining land on which the tree stands; but the roots and boughs belong to the owner of the tree, and to cut them is to interfere with his property. It is reasonable and more likely to promote good feeling between neighbours that notice should be given before cutting, in order, as was said in *Earl of Lonsdale* v. *Nelson* (1), that the owner may have an opportunity of removing the encroachment himself.

It is necessary to examine carefully the authorities on these questions. In *Brooke's* Abr. "Nusans" (2), it is stated, *per Keble*, that a man is not bound to lop a tree which incumbers a roadway "chimin," and, therefore, it should seem that another (that is, I suppose, some one not the owner of the tree) may do it. But nothing is said there about notice. *Keble* was not a judge. This, therefore, is a statement by counsel accepted by the reporter as law. In *Hale de Portibus Maris* (3): "Any man may justify the removal of a common nusance either at land or by water, because every man is concerned in it"; and he instances a case of the burgesses of *Southampton* justifying the throwing down of a weir in a creek of the sea which hindered the navigation; "but," he continues, "because this many times occasions tumults and disorders, the best way to reform public nusances is by the ordinary Courts of Justice."

(1) 2 B. & C. 302. (2) Vol. 2, p. 105, pl. 28.
(3) 1 Harg. Tracts, 87.

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In 20 *Vin.* Abr., under the head "Trees" and "Disputes between Neighbours," I find: "If trees grow in the hedge, and the fruit falls into another's ground, the owner may go in and take it. If the boughs of your trees grow out into my land, I may cut them: per *Croke*, J. (1). A tree grows in *A.'s* close, and roots in *B.'s*, yet the body of the main part of the tree being in the soil of *A.* all the residue of the tree belongs to him also" (2). There is added in a note: "But if it grows in a hedge which divides the land of *A.* and *B.*, and the roots take nourishment of both their lands, it was adjudged they are tenants in common of it (3)."

This shews that the roots, though in another man's land, belong to the owner of the tree, and it is only where the tree is on the boundary line, so that the trunk is partly in the land of each of the adjoining owners, that they become joint owners of the tree: see *Holder* v. *Coates* (4).

I have examined the authorities referred to in *Viner*.

The *dictum* by *Croke*, J. (5), is this: "*Si les rames de vestre arber excresce en mon terre, jeo poio eux succider, mes jeo ne poio justéfier le succider de eux devant ils excresce en mon terre pur timor de l'excrescer.*"

In *Pickering* v. *Rudd* (6) nailing a board to a wall so that the board overhung the land of another was held not to be a trespass, Lord *Ellenborough* saying: "I do not think it is a trespass to interfere with the column of air superincumbent on the close." He intimates that firing a gun so that the shot would strike the soil of another would be a trespass; but he doubts whether firing across another's land where the soil was not touched, or the passage of a balloon over the land, would be trespass, and says that if any damage was occasioned by the board there would be an action on the case.

In order to place the board the defendant cut away a Virginian creeper which grew in the plaintiff's garden and spread over the side of the defendant's house. He managed to do this, the

(1) 1 Roll. 394, pl. 15; Trin. Jac. B. R. S. P. per *Croke*, J.; 3 Bulst. 198.
(2) 2 Roll. 141; Hill. 17 Jac. B. R. *Masters* v. *Pollie*.
(3) 2 Roll. 255; Mich. 20 Jac. B. R. *Anon.*
(4) Mood. & M. 112.
(5) 1 Roll. 394.
(6) 4 Camp. 219, 220.

report states, by means of ropes and a scaffolding suspended over the plaintiff's garden without touching the surface of the plaintiff's premises. There was no statement in the pleadings or evidence, so far as appears, that notice had been previously given of the intention to cut. Under the direction of Lord *Ellenborough*, who said that it was admitted on the record that some damage had been done by the continuance of the tree, and that the question was whether in removing the mischief the defendant had done any damage to the tree which might have been avoided, there was a verdict for the defendant, and in the ensuing term the King's Bench refused to grant a new trial.

In *Fay* v. *Prentice* (1) it was clearly intimated that if a man were to erect any building overhanging the land of another, an action of trespass, in which it is not necessary to shew damage, would lie; but where an action on the case is brought instead to recover damages for the nuisance thereby occasioned it is necessary to shew damage to support the action.

In *Penruddock's Case* (2) the question was whether a writ of *quod permittat prosternere* would lie for the feoffee of a house to which a nuisance was being committed by the drip from an adjoining house which had been built before the feoffment to him and was in the possession of an assign of the person who built it, and it was held that it would, because this was a continuing nuisance; and it seems to have been held that he might himself abate the nuisance.

In *Earl of Lonsdale* v. *Nelson* (3) Mr. Justice *Best* states the law thus: "Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them, without notice to the person who committed them; but there is no decided case which sanctions the abatement, by an individual, of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them. The permitting these branches to extend so far beyond the soil of the owner of the trees, is a most unequivocal act of negligence, which distinguishes this case from most of the other cases that

(1) 1 C. B. 828.

(2) 5 Rep. 100 b.

(3) 2 B. & C. 311.

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have occurred. The security of lives and property may sometimes require so speedy a remedy as not to allow time to call on the person on whose property the mischief has arisen, to remedy it. In such cases an individual would be justified in abating a nuisance from omission without notice. In all other cases of such nuisances, persons should not take the law into their own hands, but follow the advice of Lord *Hale*, and appeal to a Court of Justice."

In that case the action was for trespass in entering the land of the plaintiff. It was attempted to justify it by pleading that the entry was for the purpose of repairing an ancient building necessary for the maintenance of a port partly within the plaintiff's land. It was held that before such entry notice should have been given in order that the plaintiff might have an opportunity to do the repairs himself rather than suffer the intrusion of strangers.

It is not quite clear from the language of Mr. Justice *Best* whether a man may lop the boughs of his neighbour's trees so far as they extend over his land without notice except in case of some emergency occasioning danger to life or property. The judgment contains several important propositions: (1.) The overhanging of the boughs of a neighbour's tree is a nuisance occasioned by omission. (2.) Where a nuisance is occasioned by an act of commission the person injured may abate the nuisance without notice to him who actually committed the nuisance while he is in possession. (3.) So where the security of life or property is in danger, and there is no time to give notice, the person injured may abate a nuisance occasioned by an omission. (4.) In all other cases of nuisances by omission Mr. Justice *Best's* opinion seems to be that the individual injured must not himself abate the nuisance, but should appeal to a Court of Justice. (5.) The abatement of a nuisance occasioned by the overhanging boughs of trees is stated to be the only other case in which the injured person may abate the nuisance himself. But it is not distinctly said that he may do so without notice except in a case of emergency where there is no time to give such notice.

Jones v. *Williams* (1) was an action of trespass for entering

(1) 11 M. & W. 176; 12 L. J. (Ex.) 249.

the plaintiff's dwelling-house. The defendant pleaded that the plaintiff injuriously and wrongfully permitted filth to accumulate on his premises, and that the defendant entered to abate this nuisance. After verdict for the defendant the plaintiff applied for judgment *non obstante veredicto*, and he obtained it, the plea being held bad because it did not state whether the plaintiff himself placed the filth on his premises, or whether it was placed by another and he omitted to remove it, nor did it state that the plaintiff was under any obligation to remove it, and it did not aver a previous notice to the plaintiff. The Court decided: (1.) That if the plaintiff had placed the filth there himself the defendant might enter and remove it without notice. (2.) So, possibly, if there was any obligation on the plaintiff to remove it by custom or otherwise, and he did not. (3.) But if the filth was placed there by another, and the plaintiff succeeded to the possession of the *locus in quo* afterwards, notice would be necessary before the defendant could enter to remove it. The judgment of Baron *Parke* continues thus (1): "We do not rely on the decision in *Earl of Lonsdale* v. *Nelson* (2) as establishing the necessity of notice in such a case, for there much more was claimed than a right to remove a nuisance, viz., a right to construct a work on the plaintiff's soil which no authority warranted; but Lord *Wynford's dictum* is in favour of this objection, for he states that a notice is requisite in all cases of nuisance by omission, and the older authorities fully warrant that opinion, where the omission is the non-removal of a nuisance erected by another. *Penruddock's Case* (3) shews that an assize of *quod permittat prosternere* would not lie against the alienee of the party who levied it without notice. The judgment in that case was affirmed on error; and in the King's Bench, on the argument, the Judges of that Court agreed that the nuisance might be abated, without suit, in the hands of the feoffee—that is, as it should seem, with notice"; and for confirmation of this his Lordship refers to *Jenkins'* Sixth Century, p. 260, where the case is so stated, and notice before abatement is said to be necessary. He concludes that a notice or request is necessary in the case of a

(1) 11 M. & W. 181. (2) 2 B. & C. 302.
(3) 5 Rep. 100 b.

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continuance of a nuisance by an alienee of the property and that the plea was bad; and Lord *Abinger* added a further exception where there was such immediate danger to life or health as to render it unsafe to wait to give notice.

It is significant that in the report of Lord *Wensleydale's* judgment (1) he is stated to have read Lord *Wynford's dictum* as having excepted the case of cutting the boughs of overhanging trees as a nuisance which might be abated without notice. In the judgment in the authorized report this reading of Lord *Wynford's dictum* is omitted. It would appear that, on further considering the words, Lord *Wensleydale* was not satisfied that this was their true meaning.

The result of the authorities seems to be this:—

The encroachment of the boughs and roots over and within the land of the adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. It is a nuisance.

For any damage occasioned by this an action on the case would lie.

Also, the person whose land is so affected may abate the nuisance if the owner of the tree after notice neglects to do so.

Whether he may do so without notice is not stated distinctly in any of the cases; but on the whole I think that this is the meaning. In the older cases it is said that the owner of the land encroached on may cut the boughs, and nothing is said about giving previous notice, and I think that the true reading of *Pickering* v. *Rudd* (2) is, that he may do so without notice if he can do it without trespassing upon the land in which the tree grows. I come very reluctantly to this conclusion. I think the legal question very doubtful. In my opinion it would be better if the law were, that before cutting a neighbour's trees notice should be given in order to afford to the owner of the trees an opportunity of removing the boughs which occasion a nuisance. Whether that is the law or not, no one but an ill-disposed person would do such an act without previous notice. There was no emergency in this case. The Defendant has acted in an unneighbourly manner, and I cannot help thinking he

(1) 12 L. J. (Ex.) 249. (2) 4 Camp. 219; 1 Stark. 56.

intended to cause annoyance. I do not think he ought to have any costs of the action, and I am reluctant to give him costs of the appeal.

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Solicitors: *Walter Webb & Co.; Broughton, Nocton, & Broughton.*

H. C. J.

DREW *v.* GUY.

C. A. 1894 *May* 4.

[1894 D. 204.]

Restrictive Covenant—Covenant not to carry on "similar Business."

The Plaintiffs granted a lease to the *A. B. Company* containing a covenant that the tenants would not carry on the business of a restaurant similar to that carried on by *R.*, another tenant of the Plaintiffs. *R.* was an hotel-keeper who had a restaurant on licensed premises connected with his hotel. The *A. B. Company* carried on a restaurant at which they sold tea, coffee, cocoa, pastry, and cold meat, but not any hot meat except beef pies, and this was not objected to. The *A. B. Company* having assigned their lease to the Defendant, he proceeded in his restaurant to sell hot meat and other things not sold by the *A. B. Company*. The Defendant had not a license for the sale of intoxicants, nor a victualler's license; his establishment was on a much smaller scale than that of *R.*, his premises were of an inferior class to those of *R.*, and his prices were much lower:—

Held, by *Kekewich*, J., that the Defendant's business of a restaurant was not similar to that of *R.*, and that there had been no breach of the covenant:

Held, on appeal, that the test whether the Defendant's business was similar to that of *R.* was whether it was sufficiently like it to compete with it, and that, judging by this rule, although there were considerable differences between *R.*'s business and that of the Defendant, the Defendant's business was similar to that of *R.*, and that an injunction must be granted in the terms of the covenant, with a proviso that it was not to prevent the Defendant from selling any of the articles in which the *A. B. Company* had dealt.

BY lease dated the 22nd of June, 1889, the Plaintiffs demised to the *Aërated Bread Company* for twenty-eight years from Lady-day, 1889, the messuage and shop, 327, *Vauxhall Bridge Road*. The company covenanted with the lessors that they would not "use, exercise, or carry on, or permit or suffer to be used exercised or carried on, upon the premises, or any part thereof, the

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trade or business of a slaughterman, tallow-chandler (being a melter of tallow), soap maker, tobacco-pipe maker, or turner of tobacco-pipes, brewer, distiller, licensed victualler (being a publican), keeper of a restaurant similar to that carried on by the tenant of the *Windsor Castle* public-house, glass-maker, &c.; nor the trades of a butcher, tobacconist, or greengrocer, or either of them, so long as such last-mentioned trades respectively shall respectively be carried on by other tenants of the lessors in the premises 1 & 2, *Wilton Road*, near the premises here demised and 329, *Vauxhall Bridge Road*, next adjoining the premises hereby demised."

On the 7th of January, 1887, the Plaintiffs had demised to *Samuel Raven* for eighteen years and a quarter No. 331, *Vauxhall Bridge Road*, which adjoined the *Windsor Castle* public-house. *Raven* was tenant of that public-house from the Plaintiffs, and upon taking possession of No. 331 he had opened an internal communication with the public-house and opened No. 331 as a restaurant. *Raven* at first had a separate license for No. 331, but afterwards one license was granted for it and the public-house.

On the 4th of June, 1892, the *Aërated Bread Company* assigned their lease of No. 327 to the Defendant.

Up to the time of this assignment the *Aërated Bread Company* had carried on at No. 327 a restaurant, at which they supplied (as was deposed by a manager of the company) cold roast beef, ham, tongue, brawn, pressed beef, sausages, potted meat, hot and cold beef pies, veal-and-ham pies, eggs, cakes, pastry, jams, tartlets, scones, and some other articles of the same kind, together with mineral waters of various kinds, tea, coffee, and cocoa.

The Defendant, some time after taking possession, began to supply his customers with hot meat, chops, and steaks. The Plaintiffs having objected to this, the Defendant, in January, 1893, issued the following circular to his customers: "Difficulties having arisen between the proprietor and the lessors owing to an obscure clause in the lease, the proprietor has been advised to discontinue, for the present and pending a legal settlement, the sale of chops, steaks, hot meats, and *entrées*. He hopes, however, to substitute at lunch vegetarian dishes, which he trusts may

prove not unacceptable to his customers." After this the Defendant carried on his business according to a bill of fare which he set out as an exhibit (T W G 2) to an affidavit made by him in the cause. It included soups, vegetarian dishes, potato pie, hot beef pies, vegetables, various kinds of puddings and pastry, poached eggs, oatmeal porridge with syrup cream or milk, and tea, coffee, and cocoa.

The Defendant's establishment was in much smaller premises than that of *Raven*, which was of a much higher description, with higher charges and likely to attract a superior class of customers. The Defendant's premises were not licensed for the sale of intoxicants, nor had he a victualler's license enabling him to keep his premises open till late hours.

Mr. Justice *Kekewich* held that the businesses were not similar, as alcoholic drinks were sold in one and not in the other, and that the Plaintiffs, therefore, had no ground of complaint. The Plaintiffs appealed.

Warmington, Q.C., and *S. Dickinson*, for the appeal:—

The only true test of similarity is whether the two businesses are so much alike that one would come into serious competition with the other. When the business on the Defendant's premises was carried on by the *Aërated Bread Company*, there could be no serious competition, for a person could not get a hot dinner at the company's restaurant. The Defendant now is aiming at carrying on a business which will seriously interfere with *Raven's*. That the Defendant does not sell alcoholic drinks is no doubt an important point of difference; but it is not enough to prevent the business being similar within the meaning of the covenant. The case of *Fitz* v. *Iles* (1) shews the principle applicable to such a case.

Renshaw, Q.C., and *Bramwell Davis*, for the Defendant:—

The Defendant is entitled to carry on a restaurant—only it must not be similar to *Raven's*. Restaurants must be classed mainly by style and prices: a cheap establishment like that of the Defendant carried on in a house of small pretensions cannot

(1) [1893] 1 Ch. 77.

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be considered similar to that of *Raven*. Moreover, an establishment where alcoholic drinks cannot be sold is broadly distinguished from one where they can. There is no covenant here that the Defendant will not carry on any part of the business carried on by *Raven*, and his selling some things which are the same as what *Raven* sells is no breach of the covenant: *Stuart* v. *Diplock* (1); *Lumley* v. *Metropolitan Railway Company* (2).

Dickinson, in reply.

LINDLEY, L.J.:—

This is an appeal from a refusal by Mr. Justice *Kekewich* to grant an injunction to restrain the infringement of a covenant in a lease. At the time when this lease of June, 1889, was granted, the Plaintiffs had a tenant named *Raven*, who held under them the *Windsor Castle Hotel*, and an adjoining house which he used as a restaurant. On the 22nd of June, 1889, the Plaintiffs demised the house now occupied by the Defendant to the *Aërated Bread Company* by a lease containing the covenant which the Plaintiffs are now seeking to enforce. [His Lordship read the covenant.] The *Aërated Bread Company* took the house for the purposes of their business, and it appears from the evidence of one of their managers that in the course of that business they supplied "cold roast beef, ham, tongue, brawn, pressed beef, sausages, potted meat, hot and cold beef pies, veal-and-ham pies, eggs, cakes, pastry, jams, tartlets, scones, and some other articles of the same kind, together with mineral waters of various kinds, tea, coffee, and cocoa." It is evident that they were intended to be at liberty to sell these things, and the Defendant as assignee of the lease is at liberty to sell the same things. The covenant clearly leaves the lessee at liberty to carry on the business of a restaurant; but it must not be a restaurant similar to that carried on by the tenant of the *Windsor Castle* public-house.

The question, then, is whether the business of a restaurant carried on by the Defendant is similar to that carried on by *Raven*. There are considerable points of dissimilarity between

(1) 43 Ch. D. 343. (2) 34 L. T. (N.S.) 774.

them: the Defendant has no license to sell alcoholic drinks, and no license which enables him to keep his premises open to a late hour in the evening. Do these differences prevent the Defendant's business from being similar to that of *Raven's*? There is an important degree of similarity between the two businesses. The Defendant claims the right to carry on a business which will seriously compete with *Raven's* business. I do not think that the question of similarity is to be determined by considering whether both of the establishments sell ale, or whether the houses in which they are carried on are similar in appearance, but by the consideration whether the Defendant's restaurant is so like that of *Raven* as seriously to compete with it. I think that the business of the Defendant as he proposed to carry it on would seriously compete with *Raven's*. I cannot look at the exhibit T W G 2, containing the Defendant's bill of fare, and at his circular to his customers, without seeing that the Defendant is desirous of carrying on the general business of a restaurant without a license. He must be restrained in the terms of the covenant; but we shall add to the order the statement that this is not to restrain him from selling any of the articles which, in the affidavit of the manager of the *Aërated Bread Company*, are stated to have been sold by that company. We do not mean to say that he is confined to these, but anything else that he sells must be at his own risk.

LOPES, L.J.:—

I am of the same opinion. The terms of the covenant clearly allow the lessee to carry on the business of a restaurant, but not so that it shall be similar to that of *Raven*. What is meant by similar? I should say so like that of *Raven* as to compete with it. There are substantial elements of dissimilarity between the two: one is alcoholic, the other is not, and there are many other points of difference. *Raven's* premises are superior in appearance, and would attract a higher class of customers—his prices also are higher; but all that appears to me not enough. If the Defendant supplies hot joints, chops, &c., a person wanting a hot dinner would very likely go to the Defendant rather than to *Raven*, the Defendant's lower scale of charges being an

C. A. 1894 DREW v. GUY. Lopes, L.J.

inducement. A person who wanted a hot dinner would not have gone to the *Aërated Bread Company*, but to *Raven*. If the Defendant carries on his business in the way he is seeking to do, a person may as well go to him as to *Raven*. I think, therefore, that the business the Defendant is seeking to carry on is substantially similar to that of *Raven*. I think that the Defendant is not at liberty to supply hot joints. He may sell whatever the *Aërated Bread Company* sold; but anything beyond that may give room for contest.

Solicitors: *Wilkinson & Son; Timbrell & Deighton.*

H. C. J.

C. A. 1894 CHITTY, J. *Feb.* 15, 16, 17, 20; *March* 15. C. A. *May* 1, 2, 28.

In re HOLFORD. HOLFORD *v.* HOLFORD.

[1893 H. 1155.]

Maintenance—Contingent Interest—Destination of Income after First Share has Vested—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.

A testator gave his residuary personalty upon trust to divide it equally between such of the children of *A.* living at the testator's death as should attain twenty-one. At the testator's death *A.* had six children, all infants. The will contained no maintenance clause. The first child who attained twenty-one claimed one-sixth of the capital, and also, until another child attained twenty-one, the income of the remaining five-sixths:—

Held, by the Court of Appeal (affirming the decision of *Chitty*, J.), that the income of the remaining five-sixths did not belong to the child who had attained twenty-one, but was applicable, under the *Conveyancing and Law of Property Act*, 1881, s. 43, for the maintenance of the five infants.

In re Jeffery (1) overruled.

H. S. HOLFORD, by will dated the 30th of April, 1888, after bequeathing to his brother *Thomas Holford* a legacy of £20,000, devised and bequeathed his real and personal estate to trustees upon trust that they should sell, call in, and convert the same, pay his funeral and testamentary expenses and debts, and the legacies and annuities given by his will or any codicil, and invest

(1) [1891] 1 Ch. 671.

the residue in manner thereinafter mentioned, with power to vary investments—

"And shall stand possessed of the said residuary trust moneys and the investments for the time being representing the same (hereinafter called the residuary trust funds), upon trust to pay and divide the same unto and among the child, or all and every the children, of the said *Thomas Holford*, who shall be living at the time of my decease, and who shall attain the age of twenty-one years, in equal shares, if more than one; and if there shall be only one such child, the whole to be in trust for that one child."

The testator proceeded to give his trustees power to postpone the conversion of his real and personal estate, with a direction that the income from the part for the time being unconverted should be applied as income of the trust fund. The will contained no express power of applying income for the maintenance, education, or otherwise for the benefit of persons contingently entitled.

The testator died on the 24th of July, 1888. At his death there were living six children of *Thomas Holford*, the eldest of whom, *Margaret Ann*, was born on the 5th of June, 1872; the youngest, *Charles Frederick*, on the 2nd of September, 1879.

By a settlement dated the 31st of January, 1893, made on the marriage of the eldest daughter with Mr. *Dundas*, and approved by the Court under the *Infants Settlement Act*, first, all the share or shares to which the daughter was then or would, upon attaining the age of twenty-one years, become entitled, contingently or otherwise, in the residuary trust funds and property held under the will of the testator, and of and in all income of the residuary trust funds; and, secondly, all the share or shares of the daughter in the annual income to accrue, after she should attain twenty-one, of the premises firstly described, were assigned to trustees upon trust for the daughter until her marriage, and after that event upon the trusts declared by the settlement.

On the 7th of June, 1893, Mrs. *Dundas* attained twenty-one; and shortly afterwards an originating summons was taken out to

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have it determined how the income, from the time of her attaining twenty-one, ought to be applied. It was insisted, on behalf of the younger children, that the income of the presumptive share of each child, who was under the age of twenty-one years, was applicable, at the discretion of the trustees of the will, for the maintenance, education, and benefit of such child. The parties entitled under the settlement of Mrs. *Dundas* contended that she was entitled to the whole income of the residuary estate from her attaining twenty-one until another child attained twenty-one.

The summons came on for hearing before Mr. Justice *Chitty* on the 15th of February, 1894.

Farwell, Q.C., and *Davenport*, for the infant children:—

We ask for a declaration enabling the trustees to pay a proportionate part of the funds in their hands for the maintenance of the infants.

The income of property to which infants are contingently entitled may be applied for their maintenance under sect. 43 of the *Conveyancing Act*, 1881.

The income of a mixed fund follows the capital: *Genery* v. *Fitzgerald* (1); *Countess of Bective* v. *Hodgson* (2). A gift of residue carries the income of the residue: *Kidman* v. *Kidman* (3).

We submit that the decisions of Mr. Justice *North* in *In re Jeffery* (4) and *In re Adams* (5) are not correct. Your Lordship, in *In re Burton's Will* (6), dissented from *In re Jeffery*, and we submit your Lordship's view is the correct one.

The cases of *Shepherd* v. *Ingram* (7), *Mills* v. *Norris* (8), and *Scott* v. *Earl of Scarborough* (9), relied on by Mr. Justice *North*, are all distinguishable, and, moreover, are inconsistent with *Brandon* v. *Aston* (10) and *Rochford* v. *Hackman* (11). In *Furneaux* v. *Rucker* (12) the gift was not residue at all, but a specific leasehold house.

(1) Jac. 468.
(2) 10 H. L. C. 656.
(3) 40 L. J. (Ch.) 359.
(4) [1891] 1 Ch. 671.
(5) [1893] 1 Ch. 329.
(6) [1892] 2 Ch. 38.
(7) Amb. 448.
(8) 5 Ves. 335.
(9) 1 Beav. 154.
(10) 2 Y. & C. Ch. 30.
(11) 9 Hare, 475.
(12) W. N. (1879) 135.

Byrne, Q.C., and *George Lawrence*, for Mrs. *Dundas*, the eldest daughter, who had attained twenty-one:—

The whole income of the residuary estate now belongs to the daughter who has attained twenty-one till the next child attains twenty-one, and so on till the youngest attains twenty-one: *Shepherd* v. *Ingram* (1); *Mills* v. *Norris* (2); *Scott* v. *Earl of Scarborough* (3); *Furneaux* v. *Rucker* (4).

We submit that the view of Mr. Justice *North* in *In re Adams* (5) is the correct one.

Cunliffe, for the trustees of the will.

H. F. Wilson, for the trustees of Mrs. *Dundas*' settlement.

Farwell, in reply.

1894. March 15. CHITTY, J.:—

The questions raised in this case are of considerable importance, often recurring, particularly in Chambers, in reference to the maintenance of infants.

The will is simple. The residuary estate, consisting of a mixed fund made up of the proceeds of sale of real estate and of personal estate, is given to trustees upon trust for the child or children of the Defendant *Thomas Holford* living at the testator's decease, and who shall attain the age of twenty-one years, in equal shares if more than one, and, if but one, the whole to be in trust for that one child. The gift, then, is to a class contingently, and the class is not capable of increase after the testator's death. There is no maintenance clause in the will, which was made in 1888. At the testator's death there were living six children of the Defendant, all infants; one daughter has recently attained her majority, and has settled her interest under the will. The income of the residuary estate is very large, amounting to some £10,000 a year. The accumulations of income during the period which elapsed before the eldest daughter came of age, and not expended in maintenance, amount to above £40,000.

(1) Amb. 448.
(2) 5 Ves. 335.
(3) 1 Beav. 154.
(4) W. N. (1879) 135.
(5) [1893] 1 Ch. 329.

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On behalf of the eldest daughter and her trustees, the following claims are made: First, to her sixth share of the original residuary estate and of the fund accumulated during her minority; secondly, to the whole of the income of the residuary estate accruing from the time she came of age until the next child comes of age, and from that time to one-half of the same income until another child comes of age, and so on until the youngest child comes of age; and thirdly, to the income of the accumulated fund in like manner. The result of these claims, if valid, is that during the period beginning with the coming of age of the eldest and ending with the coming of age of the youngest child, the whole of the income would belong to the children for the time being of age, and no part of it would be available for the benefit of the children for the time being under age, or would go to them with their shares of capital on their coming of age. But the remaining five-sixths of the present accumulated fund, composed although they are of surplus past income, are not claimed by the eldest daughter. The reasons why they are not claimed appear to be as follows. It is admitted, in conformity with *In re Adams* (1), and consistently with the principle of the decision of the Court of Appeal in *In re Dickson* (2), that during the minority of the eldest daughter the 43rd section of the *Conveyancing Act*, 1881, applied. Consequently, it is further admitted that, by virtue of the 2nd sub-section of the same section, the accumulations of income not applied in maintenance, and made up to the time of the eldest daughter coming of age, are held for the benefit of the persons who ultimately may become entitled to the property (that is, the five-sixths of the *corpus* of the residuary estate) from which the accumulations had arisen.

The effect of these claims and disclaimer for the eldest daughter is certainly curious, and (as it strikes me) anomalous. A line is drawn—and, as it seems to me, arbitrarily drawn—on the coming of age of the eldest child. Neither by express terms, nor, as I think, by implication, is such a line drawn by the 43rd section; on the contrary, the five-sixths of the original residuary estate and of the accumulated fund are still held by the trustees

(1) [1893] 1 Ch. 329. (2) 29 Ch. D. 331.

for infants contingently on their attaining the age of twenty-one years, in the language of the 1st sub-section, and I am not able to see why the section does not apply to these remaining parts of the estate and fund. The argument for the eldest daughter, however, is that the effect, which I have ventured to describe as curious and anomalous, is necessarily produced by a rule of construction founded on particular authorities.

So far as the testator's intention is concerned, it appears to me to be plain that all the children who attain twenty-one are to take equally. To take what? An equal share of the capital certainly. Income is not mentioned. But as they are to take an equal share of the capital, and as the income, being as it is the income of a trust residue, follows the capital, the intention is that each child should take the income of the aliquot share of capital to which he or she ultimately becomes entitled. No preference, no priority of any sort, is conferred upon the child who first attains the age of twenty-one years. To hold that the eldest child on coming of age thenceforth takes the whole of the income in the manner claimed appears to me to be a departure from the manifest intention of equality, and to confer on that child a preference in violation of the terms of the will. The leading authorities on the question of income following the capital are *Genery* v. *Fitzgerald* (1), decided by Lord *Eldon*, and *Countess of Bective* v. *Hodgson* (2). In the latter case Lord *Westbury* stated the principle in reference to residuary personalty. There is no difference on this point between residuary personalty and such a residuary trust fund as the present. He lays it down that if by a will the whole of the personal estate, or the residue of the personal estate, be the subject of an executory bequest, the income of such personal estate follows the principal as an accessory, and must during the period which the law allows for accumulation be accumulated and added to the principal. The principle enunciated, which Lord *Westbury* terms a "cardinal principle," is that the increase of the fund follows the destination of the fund itself as an accessory. It appears to me to apply equally where the residuary personal estate is given contingently to one person or two or more by name or to a class. Where the

(1) Jac. 468. (2) 10 H. L. C. 656.

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gift is to two or more by name contingently on attaining twenty-one, each is entitled to his share of the principal and the increase which has been produced by it; and I can see no difference material to the present question between such a gift to persons by name and a like gift to a class. I have a strong impression that the course of the Court has been, that where a fund is standing to the account of a class contingent on attaining twenty-one, the regular and common order has been on the eldest child attaining that age to pay out his share of capital and income, and to carry over the residue in shares to the separate contingent accounts of the infants, with a direction to accumulate the interest on each share so carried over. I remember Sir *John Romilly*, on such a petition being presented by the child of age, holding that the costs of the petition ought to come, not out of the share, but out of the general fund where such a carrying over was directed, as in that case the order taken was for the common benefit of all interested; the effect being, that each of the infants on coming of age could apply for his share without serving the others. I have consulted several of the most experienced Registrars as to the course of the Court in such matters, and they all say that the common order is such as I have above stated. I requested one of them to make some search for precedents. The difficulty, as I anticipated, has been to discover a clue. The question is one which has passed apparently without note in the Registrars' books, and also without argument. The latter circumstance indicates the general opinion entertained at the Bar. The research of one of the Registrars (Mr. *Lavie*), which has necessarily not been of an exhaustive character, has, however, produced three cases which seem to be in point.

I have also spoken to Mr. Justice *Stirling* on the point, and have his authority for stating that since the recent decision in *In re Adams* (1) he has had the question before him in Chambers on more occasions than one, that he has offered to adjourn the case into Court for argument if desired, that counsel, however, have preferred to take his decision in Chambers, and that he has declined to follow that authority, so far as it indicates an opinion against the infants, and that he has refused to order payment of

(1) [1893] 1 Ch. 329.

the whole of the income to the child of age, and that his opinion, though expressed in Chambers, has been acquiesced in. I also have adopted a similar course in Chambers with a similar result.

The precedents furnished to me by the Registrar include the following three cases:—

In the Matter of Samuel Higgins, before Lord *Romilly*, in 1866. The fund consisted of a legacy of £2000, severed from the rest of the estate and bequeathed to trustees (so far as material) upon trust for the brother and sisters of *Sarah Higgins Goode*, in equal shares, to be vested in them respectively when and as they should attain the age of twenty-one years. *Eliza Goode*, mother of *Sarah Higgins Goode*, was living at the time of the presentation of the petition, and was forty-nine years of age, and consequently not presumed to have passed the age of child-bearing. The petition was by a child who had recently attained twenty-one, and the respondents were the other seven children, all under age. The residuary legatees were also served. A person was appointed to represent the four children of *Eliza Goode*, who, having survived the testator, had died under twenty-one. The order made on the 23rd of June, 1866, after directing taxation of the costs of the parties, divided the balance of the fund into eight shares, and ordered payment of one share and the past accumulations of income in respect of that share to the Petitioner, and the carrying over of the other seven shares to the separate contingent accounts of the infants. There was no maintenance clause in the will applicable to these infants set out in the petition. The order is prefaced by a statement of the opinion of the Court that the fund, which in fact consisted of the legacy and past accumulations of interest, was divisible into eight parts. The Court, therefore, held that the children of *Eliza Goode* took contingent interests, and treated the income as following the ultimate destination of the capital of each of the shares, and applied this principle to the case of a contingent gift to a class which was capable of increase down to the time when a member of the class had become entitled to a share of the capital.

Re James Higgins, before Lord *Romilly*, also in 1866. The effect of the will was a gift of a share of residue in trust for a class contingent on attaining twenty-one. The shares of those

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who had come of age were paid to them, and the shares of the infants were carried over to separate contingent accounts.

Re Toder, before me in 1884. The gift was of a sum part of the residue upon trust to invest and to accumulate and to hold the fund and accumulations in trust for such of six persons named as should attain twenty-one in equal shares. A similar order was made directing payment to the person who had come of age, and the carrying over of the infants' shares.

In ordinary circumstances my judgment would have stopped here, if not sooner; but out of deference to the opinion apparently entertained in *In re Adams* (1), I proceed to mention shortly the reported cases cited at the Bar for and against the eldest daughter's contention.

Many of them have, in my opinion, but little bearing on the present controversy. The cases cited against the eldest daughter's contentions are *Brandon* v. *Aston* (2), *Rochford* v. *Hackman* (3), and *Kidman* v. *Kidman* (4), and they appear to me, so far as they go, to be in favour of the argument for the infants.

In *Brandon* v. *Aston* the gift was to a class contingent on attaining twenty-one, or as to daughters marrying, but capable of increase by reason of the father being alive at the time when his interest determined. *Knight Bruce*, V.C., held that the children, who at that time were of age, were entitled only to the income of their vested shares, and directed that the income of the share of an infant then living should be carried over to the contingent share of the infant. It is said that the point was not argued in reference to the income; but the eminent counsel engaged, and by whom the authorities, such as *Shepherd* v. *Ingram* (5) and the like, were cited, were not likely to have overlooked the point..

In *Rochford* v. *Hackman* the testator's son *Richard* had a life interest determinable, and it was held that his interest had determined. After his decease the share of residue in which he took the life interest was given to his children as and when they should attain twenty-one. He had, when his interest

(1) [1893] 1 Ch. 329.
(2) 2 Y. & C. Ch. 30.
(3) 9 Hare, 475.
(4) 40 L. J. (Ch.) 359.
(5) Amb. 448.

ceased, two children living, one of age; and the other an infant. Sir *George Turner* held that the interests of the children were not accelerated, and that the fund was not distributable until after the death of the testator's son, when the class was to be ascertained, but that, on the question of the title of the children to the intermediate income, the child then of age was entitled to a share, but only a share of the income, and that the income of the other share to which the infant child was contingently entitled ought to be accumulated. This is a decision that the child who had a vested interest in a share liable to be divested by after-born children was not entitled to the whole of the subsequent income, and that the income to which the infant child was contingently entitled ought to be accumulated to follow the result. There was a maintenance clause in the will whereby the trustees were directed to apply the whole of the shares of the children, or so much thereof as they should think fit, for their maintenance; but this clause is not referred to in the judgment. In the case before me the maintenance section is imported by the Act into the will.

In *Kidman* v. *Kidman* (1), Vice-Chancellor *Malins* held that the interests of the children were contingent on their attaining twenty-one, and that, inasmuch as the fund was severed from the rest of the estate, the income followed the capital, and accordingly that "all the income from the death of the annuitant for life till the children attained the age of twenty-one years must be accumulated and go with the capital, each child on attaining twenty-one taking his or her share of the fund as it then exists."

The cases cited for the daughter are all, with the exception of *In re Adams* (2), already mentioned, and *Furneaux* v. *Rucker* (3), cases in which the class was liable to future increase; and underlying them there seems to be an analogy to the rule of convenience, as it has been called, adopted in *Whitbread* v. *St. John* (4), in regard to the distribution of capital—a rule on which I commented in *In re Wenmoth's Estate* (5), and which I there declined to apply to a gift of income. They are: *Shepherd* v.

(1) 40 L. J. (Ch.) 359.
(2) [1893] 1 Ch. 329.
(3) W. N. (1879) 135.
(4) 10 Ves. 152.
(5) 37 Ch. D. 266.

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Ingram (1), *Mills* v. *Norris* (2), *Scott* v. *Earl of Scarborough* (3), *In re Jeffery* (4), *In re Adams* (5), already referred to, and *Furneaux* v. *Rucker* (6).

Shepherd v. *Ingram* was a case of a gift of residue to the children of a living person in such a form as to vest at birth, but defeasibly in the event of the parent dying without leaving issue. It was held by Lord *Northington* that the first child born took the whole of the interest until the birth of the second child, and that after the birth of the second child the first and second children took the interest in equal shares, and so on. This case appears to me to be distinguishable from the present on the ground that the interests of the members of the class were there vested as they severally came into existence.

In *Mills* v. *Norris* the will was special; again it was a case of a class liable to increase. It was held by Lord *Loughborough* that upon the enlargement of the class by the birth of another child such child was not entitled to participate in the bygone income which had arisen previously to his birth.

In *Scott* v. *Earl of Scarborough* the will was very peculiar, and to a certain extent inconsistent. It was held that the ordinary rule of convenience as to the distribution of a fund among a class capable of increase was on construction excluded by express terms, and that the grandchildren of age at the time indicated by certain terms in the will as the time for distribution took vested interests liable to be partially divested and diminished; but, again, on the construction of the will that the grandchildren then of age were entitled in respect of their vested interests to the income of the fund notwithstanding this liability, and, further, that no part of the income ought to be retained for the benefit of a grandchild who was then an infant, or of grandchildren (if any) who might be subsequently born and ultimately take vested interests.

In *Furneaux* v. *Rucker* the gift was a specific bequest of leasehold property on a contingency; and the rule is that such a gift does not convey the intermediate income. Consequently

(1) Amb. 448.
(2) 5 Ves. 335.
(3) 1 Beav. 154.
(4) [1891] 1 Ch. 671.
(5) [1893] 1 Ch. 329.
(6) W. N. (1879) 135.

this income fell into the residue until one of the class came of age; and the Master of the Rolls (Sir *G. Jessel*) held that the child of age took the income from that date. But in this case the income did not follow the capital during the suspense of vesting, but fell into the residue.

For the reasons above stated I find myself constrained to decline to follow the case of *In re Adams* (1) so far as an opinion is there expressed that children on attaining vested interests would be entitled thenceforth to the whole of the income as against those who, being still infants, had merely a contingent interest in the capital. The decision in *In re Jeffery* (2) still appears to me, as it did when I decided *In re Burton's Will* (3), not to be inconsistent with the opinion I have formed as to such a gift as that now before me.

I hold, therefore, that the eldest daughter is entitled to receive her sixth share of the original capital and of the accumulated fund and income down to the time of her taking a vested interest, but not to the income of the remaining five-sixths of the original capital and accumulated fund during the suspense of vesting. This income is applicable during the suspense to the maintenance of the infants. My opinion would have been the same if the class had been liable to increase after the testator's death, subject to this exception—that the class would have closed on the eldest child attaining a vested interest.

G. M.

C. A.

From this judgment Mrs. *Dundas* appealed. The appeal was heard on the 1st and 2nd of May, 1894.

Byrne, Q.C., and *George Lawrence*, for the Appellant:—

The Appellant is entitled to the whole income until another child attains twenty-one. On her coming of age she attains a vested interest in the whole capital, subject to be partially divested as each of the other children attains twenty-one. The income must follow the principal. Till the Appellant attained twenty-one the rents and profits fell into the residue; but as

(1) [1893] 1 Ch. 329. (2) [1891] 1 Ch. 671.
(3) [1892] 2 Ch. 38.

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soon as that event happened the capital became vested and the residue took no more: *Shepherd* v. *Ingram* (1); *Mills* v. *Norris* (2); *Scott* v. *Earl of Scarborough* (3); *Mainwaring* v. *Beevor* (4); *Ellis* v. *Maxwell* (5); *In re Jeffery* (6); *In re Burton's Will* (7); *In re Adams* (8); *In re Dickson* (9); *Furneaux* v. *Rucker* (10).

[KAY, L.J., referred to *In re Humphreys* (11) and *In re Inman* (12).]

There is no gift of the income and no direction as to maintenance, and the trustees have no power to devote any portion of the income for that purpose.

[LOPES, L.J., referred to *In re Judkin's Trusts* (13) and *Rochford* v. *Hackman* (14).]

Before *Lord Cranworth's Act* the ordinary jurisdiction was to give maintenance out of the income of property vested in possession; but the Court in some cases had assumed jurisdiction to grant maintenance where a number of infants were entitled contingently on attaining twenty-one, and the property, both principal and interest, must ultimately come to them or the survivors of them. *Lord Cranworth's Act* (23 & 24 Vict. c. 145), s. 26, enabled the trustees to do what the Court had been in the habit of doing in these cases. The language of the *Conveyancing Act*, 1881, s. 43, was somewhat different, and an opinion was not uncommonly entertained that under it maintenance could be given even where the infant was not entitled to the income contingently on attaining twenty-one; but this view was finally overruled in *In re Dickson*.

Farwell, Q.C., and *Davenport*, for the infant children:—

The construction adopted by Mr. Justice *North* in *In re Jeffery* is unsupported by the authorities, and Mr. Justice *Chitty* was right in declining to follow that case. *Hawkins* v

(1) Amb. 448.
(2) 5 Ves. 335.
(3) 1 Beav. 154.
(4) 8 Hare, 44.
(5) 12 Beav. 104.
(6) [1891] 1 Ch. 671.
(7) [1892] 2 Ch. 38.
(8) [1893] 1 Ch. 329.
(9) 29 Ch. D. 331.
(10) W. N. (1879) 135.
(11) [1893] 3 Ch. 1.
(12) Ibid. 518.
(13) 25 Ch. D. 743.
(14) 9 Hare, 475.

Combe (1) is an old and leading case, and is a direct decision in our favour. No single case can be referred to on the other side where the whole income has been given to a child who had attained twenty-one if there was an infant child in existence at the time. The rule in *Genery* v. *Fitzgerald* (2) makes the gift a gift of income as well as capital; so that each child takes a contingent share of income as well as capital. This is very clearly put by Lord *Westbury* in *Countess of Bective* v. *Hodgson* (3). The Appellant cannot claim more than a sixth of the capital—why then of the income? Assuming the true view to be that the whole estate vests in the child who first attains twenty-one liable to be in part divested, the income vests only in the same way as the principal, liable to be divested in favour of other children who attain twenty-one. As regards the cases cited against us, *Shepherd* v. *Ingram* (4) was much relied upon, but it does not touch the present case: it was not a question of the right to income as between children *in esse*, but as between a child who had attained twenty-one and children who might afterwards be born. *Mills* v. *Norris* (5) is equally irrelevant. There a testator gave a fund to the children of his daughter who should attain twenty-one or marry in equal shares. Two children attained twenty-one, and there were four others. Two years after the second child attained twenty-one a seventh child was born, and the case only decided that this child had no right to participate in the income accrued before its birth. *Scott* v. *Earl of Scarborough* (6) is equally irrelevant for the present purpose. There the members of the class in existence had attained twenty-one; but there was still a possibility of the class being increased. The Court refused to make any division of capital as the shares were not ascertained, but gave the whole income to the existing members of the class. *Mainwaring* v. *Beevor* (7) and *Ellis* v. *Maxwell* (8) were similar. *Furneaux* v. *Rucker* (9) merely decided that a gift of a specific thing does not carry income accrued before the gift vests; the intermediate income remains in the residuary legatee. We

(1) 1 Bro. C. C. 335.
(2) Jac. 468.
(3) 10 H. L. C. 656.
(4) Amb. 448.
(5) 5 Ves. 335.
(6) 1 Beav. 154.
(7) 8 Hare, 44.
(8) 12 Beav. 104.
(9) W. N. (1879) 135.

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appeal to Lord Justice *Kay* whether, in the course of his experience as a Judge of first instance, under a gift of this nature, he ever met with a case of a petition by the first child who came of age to have his share of capital paid to him and the whole of the income till the next child attained twenty-one.

[KAY, L.J. :—No such case ever came before me.]

In *Brandon* v. *Aston* (1) and *Kidman* v. *Kidman* (2) the Judges appear to have treated the present point as clear, and *Rochford* v. *Hackman* (3) is in our favour. See the observation of the Judge (4).

Cunliffe, for the trustees of the will.

H. F. Wilson, for the trustees of Mrs. *Dundas*' settlement.

Byrne, in reply.

1894. May 28. LINDLEY, L.J. :—

This is an appeal from an order of Mr. Justice *Chitty*, declaring that the trustees of a residuary estate, contingently given to six infants, one of whom (a daughter) has attained twenty-one, are entitled to apply five-sixths of the income of such estate to the maintenance of her five brothers and sisters, who are still infants. [His Lordship read the will and stated the facts, and continued :—]

The order appealed from appeared so manifestly right that I confess that I was surprised to find it made the subject of an appeal.

It must be remembered that the income of a residuary personal estate, or of a residuary fund arising from the proceeds of the sale of real and personal estate, is regarded as accessory to the capital, and belongs to those to whom such residue is bequeathed: see *Genery* v. *Fitzgerald* (5) and *Countess of Bective* v. *Hodgson* (6). The income of such a residue belongs to the legatees thereof absolutely or contingently, according to the terms of the residuary gift.

(1) 2 Y. & C. Ch. 30.
(2) 40 L. J. (Ch.) 359.
(3) 9 Hare, 475.
(4) 9 Hare, 484.
(5) Jac. 468.
(6) 10 H. L. C. 656.

The case which has to be dealt with may therefore be put thus: A testator bequeaths property, and the income of it, to such of the six children of *A.* as shall attain twenty-one, and it is contended that, as soon as one of them attains twenty-one, he or she is entitled to the whole income until another of them attains twenty-one, and that then those two are entitled to the whole income until another attains twenty-one, and so on. This most extraordinary contention is not based on the intention of the testator, and is obviously opposed to that intention. But it is said that there is a series of decisions which compel the Court to defeat that intention and to do a manifest injustice to the younger children. It is sought to make the injustice palatable to trained lawyers by wrapping it up in technical language, and by bringing out the desired result as the logical conclusion from premises too well settled to be open to controversy. I confess that when I am sought to be driven to a conclusion which appears to me unreasonable and unjust, I at once suspect the validity of the premises, even if I can detect no flaw in the reasoning from them.

The argument for the Appellant is based on the assertion that, in the case of such a gift as I have mentioned, each child, as he attains twenty-one, acquires a vested interest in the whole fund, subject to be divested by other children attaining twenty-one, and that the first child who attains twenty-one is entitled to the whole income of the fund until some other child attains twenty-one and thereby acquires a similarly vested interest. But upon what principle a child who attains twenty-one acquires, as between himself and his brothers and sisters, a vested interest in more than one-sixth of the fund is to me quite unintelligible. The fund is given to all the children alike. As each attains twenty-one he becomes absolutely entitled to one-sixth; he and the other children are still contingently entitled to the remaining unvested shares; but no child who has attained twenty-one is entitled to a vested interest in more than one-sixth until his share is increased by the death of one or more of the other children under twenty-one. This is as true of the income as of the capital, and is in accordance with common sense and justice, and is, moreover, warranted by *Hawkins* v. *Combe* (1) and *Brandon*

(1) 1 Bro. C. C. 335.

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v. *Aston* (1), which last case is undistinguishable in any material respect from the present.

The principal authorities relied upon by the Appellant are *Shepherd* v. *Ingram* (2), *Mills* v. *Norris* (3), and *Scott* v. *Earl of Scarborough* (4). But, when those cases are looked at, it will be seen that not one of them decides the rights *inter se* of the existing members of a class of persons contingently entitled to property. *Shepherd* v. *Ingram* was a decision on the rights of such a class of persons, on the one hand, and other persons not included in that class, on the other; it turned on the effect of a contingent gift to a class, and of a gift over in the event of no one of the class attaining an absolute interest. But in this case we have no concern with any one who is not a member of the class to whom the gift is made. That class cannot now wholly fail, for one child has attained twenty-one, and, if all the other members of the class die under twenty-one, the child who has attained twenty-one will take the whole fund absolutely. There is good sense in saying that the income of property given contingently to a class of persons belongs to its members for the time being, as against persons who are only entitled if and when the class ceases to exist; but there is no sense in saying that one of a class takes the whole income, in which other persons belonging to the same class have already a contingent interest which may become absolute. In *Mills* v. *Norris* and *Scott* v. *Earl of Scarborough*, the question for decision was whether some members of a class were entitled to the income of property given to them and others of the same class who were not yet born, and the answer was "Yes." The decision was obviously reasonable and just. To treat the future possible rights of unborn persons as existing rights, even if only contingent, would have been to depart from sound principles with no sufficient justification. The other older cases cited by the Appellant are open to similar observations, or present still less difficulty. *In re Jeffery* (5), decided by Mr. Justice *North*, proceeded, in my opinion, upon a misconception of the cases to which I have alluded, and cannot

(1) 2 Y. & C. Ch. 30.
(2) Amb. 448.
(3) 5 Ves. 335.
(4) 1 Beav. 154.
(5) [1891] 1 Ch. 671.

be supported. *Furneaux* v. *Rucker* (1), referred to by Mr. Justice *North* in *In re Jeffery* (2), and again more fully in *In re Adams* (3), presents some difficulty; but it was not a case of a residue, and I do not know enough about it to adopt it as an authority for departing from the principle on which *Hawkins* v. *Combe* (4) and *Brandon* v. *Aston* (5) were decided.

I come, therefore, to the conclusion that the infant children are contingently entitled to five-sixths of the residue with which we have to deal, and that neither the whole capital nor the whole income of such residue is during their minority vested in or payable to the child who has attained twenty-one.

If this be so, it is plain that the *Conveyancing Act*, 1881 (44 & 45 Vict. c. 41), s. 43, authorizes the trustees to apply the infants' contingent shares of income towards their maintenance. [His Lordship read the section and continued:—]

It is true that, if all members of the class had died under twenty-one, there would have been an intestacy, and the next of kin would have taken the residue; but, notwithstanding that possibility, the Act authorizes the application of the income towards the maintenance of the members of the class whilst all are under age. This was decided, and quite rightly, in *In re Adams* (6). So although, if those children who are still under age should die under twenty-one, the child who has attained twenty-one will take their shares, still the Act authorizes the application for their maintenance of the income of their contingent shares, for that income contingently belongs to them. This conclusion is perfectly consistent with the decision of this Court in *In re Dickson* (7), for the interest on the legacy there in question did not follow the legacy before it became vested, but was payable to persons other than the legatee. The Court held that sect. 43 did not authorize the maintenance of an infant out of income which did not, and never could, belong to him; but the Act was clearly intended to authorize, and does authorize, his maintenance out of income which will become his

(1) W. N. (1879) 135.
(2) [1891] 1 Ch. 671.
(3) [1893] 1 Ch. 329.
(4) 1 Bro. C. C. 335.
(5) 2 Y. & C. Ch. 30.
(6) [1893] 1 Ch. 332.
(7) 29 Ch. D. 331.

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if he lives long enough to acquire a vested interest in the property from which the income arises.

If the contention of the Appellant were sound, it would follow that although, whilst all the children were under age, all might have been maintained out of the income of this residue, yet that, as soon as one of them attained twenty-one, he became entitled to the whole income, and none of it could be applied to the maintenance of his brothers and sisters. They would be left to the charity of their relations or to the poorhouse. I cannot construe the will or the Act so as to bring about so monstrous a result.

The decision appealed from is quite correct, and the appeal must be dismissed with costs.

My Brother *Lopes* authorizes me to say that he concurs in this judgment.

KAY, L.J. :—

A difference of opinion has arisen concerning the construction and effect of a gift by will of residue to such of the children of *A.*, living at the testator's death, as shall attain twenty-one.

At the testator's death the maximum number to take are ascertained, and the question is whether the first who attains twenty-one takes all the income, subject to admitting others to share as they respectively attain that age, or whether he should only have a share of such income according to the number of individuals living who, if they attain twenty-one, will acquire vested interests.

None of the older authorities is exactly in point. But there are cases where the gift was in effect to all the children who may be born to *A.* in his lifetime, where *A.* at the testator's death has only one child, and there is authority for giving all the income to that child until another is born. The difference is obvious. There is no possibility of saying what is the least share to which the existing child is entitled, and therefore the alternative is to give him all or nothing.

The words of the will in this case, which we have to construe, are a gift of the residue of the proceeds of the testator's real and personal estate, after payment of debts and legacies, "Upon

trust to pay and divide the same unto and among the child or all and every the children of the said *Thomas Holford*, who shall be living at the time of my decease, and who shall attain the age of twenty-one years, in equal shares if more than one; and if there shall be only one such child the whole to be in trust for that one child."

Thomas Holford was a brother of the testator. At the testator's death he had six children, all infants. One of these children has now attained twenty-one; the others are still infants.

There is no provision for maintenance in the will. It is obvious that the statutes, 23 & 24 Vict. c. 145, s. 26 (*Lord Cranworth's Act*), and the *Conveyancing Act*, 1881, s. 43, which enlarge the power of giving maintenance in certain cases, cannot affect the construction of the will. The words must be first construed, and then it must be seen whether the case is one in which the statute enables maintenance to be given. The testator was not *in loco parentis* to these legatees. Whichever construction be adopted, there would be no power to give maintenance to the infant children independently of the statute. Therefore any argument as to the hardship of adopting one or other construction, on the ground that the statute would not apply, is entirely out of the question, and very likely to lead to error. To adopt one construction, because in that case the statute would enable maintenance to be provided for the infant children, would be wrong in point of logic and principle. This is a case in which the testator has not provided maintenance out of the income of a contingent share, and if he has given that income to some one other than the infant the statute does not enable the Court to take away the income so given in order to maintain the infants: *In re Dickson* (1).

The question is whether, upon the true construction of the will, independently of the statutes, the testator has given away the intermediate income or not.

In *Shepherd* v. *Ingram* (1764) (2) there was a gift of the residue of real and personal estate to such child or children as the testator's daughter *F.* should have, as tenants in common; if she left no child there was a gift over. *F.* married after the testator's

(1) 29 Ch. D. 331. (2) Amb. 448.

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death, and had three children, all infants. It was held that the children took interests which were defeasible, and that the first born took all the income and must share with others as they came into existence. It is clear that the children's interests were not contingent but vested, subject to be divested if all died in their mother's lifetime.

This decision was followed in *Mills* v. *Norris* (1); *Scott* v. *Earl of Scarborough* (2).

In *Hawkins* v. *Combe* (3) the testator gave his residuary personal estate to trustees as to one-third to invest, and during the joint lives of his niece and her husband, or until one of her children should attain twenty-one, to accumulate the income, and, if she survived her husband and had issue under twenty-one, then to pay the interest to her for their maintenance, and on their respectively attaining twenty-one to pay and transfer the capital and all arrears to such children equally. There were two children, one of whom had attained twenty-one. The father and mother were living, and Lord Commissioner *Ashhurst* held that when the eldest came of age the accumulation ceased, and the income thenceforward belonged to the two children in equal shares, although the infant's interest in the capital was contingent.

In *Brandon* v. *Aston* (4) the gift was to such of the children of *J. N.* as should attain twenty-one, or being daughters marry, in equal shares. There were three children, two of whom had attained twenty-one when their interest came into possession. The Vice-Chancellor allowed to those two the interest of their shares only, the remaining one-third was carried to the contingent account of the infant, and the order was expressed to be without prejudice to the claim of any future-born children.

This case shews what I apprehend is the true distinction between the two classes of cases, which I indicated in the commencement of my judgment. The Vice-Chancellor did not think he could withhold their actual shares of the income from the children who were in existence, because of the possibility that others might be born who might become entitled to share. On

(1) 5 Ves. 335.
(2) 1 Beav. 154.
(3) 1 Bro. C. C. 335.
(4) 2 Y. & C. Ch. 30.

the other hand, he did not think it right to give the whole income to the children who had attained twenty-one, and whose shares had vested so as to deprive an infant who was in existence of his contingent share if he attained twenty-one. This case was cited, and seems to have been followed, in *Rochford* v. *Hackman* (1).

In *In re Jeffery* (2) Mr. Justice *North* seems to treat this case as though it were inconsistent with the previous decisions to which I have referred; but with deference, for the reasons I have given, I do not think it at all at variance. It seems to me to follow those decisions as to unborn members of the class, but to make a distinction as to individuals in existence who, if they attain twenty-one, will become entitled to share.

In *In re Burton's Will* (3) Mr. Justice *Chitty* differs from the conclusion of Mr. Justice *North*; but though *Brandon* v. *Aston* (4) was cited, he does not refer to it in his judgment.

The question came again before Mr. Justice *North* in *In re Adams* (5), in which, after considering the case of *In re Burton's Will*, he adhered to his former decision, relying upon a case of *Furneaux* v. *Rucker* (6), in which it appears that the late Master of the Rolls, Sir *George Jessel*, gave all the income of specifically devised leaseholds to a child who had attained twenty-one, to the exclusion of other existing children who were infants who might become entitled if they attained twenty-one.

The balance of authority, as well as reason, seems to me to be in favour of holding that the child who first attains twenty-one under such a gift as the present should receive only an aliquot share of the income in proportion to the number of existing children, subject to be increased if any child should die under twenty-one. The income of the contingent shares, independently of the statute, would be accumulated for the benefit of those who may become ultimately entitled to it. To the income of such a contingent share the statute applies.

It is obvious that only those who attain twenty-one will become entitled to such income. But the statute nevertheless enables

(1) 9 Hare, 475.
(2) [1891] 1 Ch. 671.
(3) [1892] 2 Ch. 38.
(4) 2 Y. & C. Ch. 30.
(5) [1893] 1 Ch. 329.
(6) W. N. (1879) 135.

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the application of the contingent share of the income for the maintenance of an infant who may never become entitled to any of it, and thus takes away that income from the others who attain twenty-one; and indeed it goes further, and directs the accumulation and capitalization of any of such contingent income not required for the maintenance of the infants. This is very arbitrary legislation. But it was attempted to carry the operation of the statute further, and to make out that it had the same effect even where the intermediate income, until the legatee attained twenty-one, was given by the will to another person. The peculiar wording of the *Conveyancing Act*, 1881, s. 43, differing from *Lord Cranworth's Act* (23 & 24 Vict. c. 145), s. 26, afforded considerable ground for this argument; but a construction so shocking to reason and justice was rejected by the Court; and it may now be considered settled that, when, either expressly or by the true construction of the will, the intermediate income is disposed of, such income cannot be taken away from the person entitled to it in order to maintain an infant only contingently entitled to the capital from which it is derived: *In re Judkin's Trusts* (1); *In re Dickson* (2).

Solicitors: *Sutton, Ommanney, & Rendall; Cunliffes & Davenport.*

(1) 25 Ch D. 743. (2) 29 Ch. D. 331.

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1893

July 1, 4, 5, 6, 7, 8, 11, 12, 13.

1894

May 9.

[1892 B. 5672.]

Water—Underground Springs—Interference with Flow of Water—Injunction—Tunnel for draining Mine—Mala fides—Indirect Motive—Works undertaken for purpose of Extorting Money.

The Plaintiffs were the owners of waterworks which they had purchased from a company, which had constructed them under the powers of a special Act. The undertaking of the company was vested in the Plaintiffs. The Act authorized the company to take the water from some springs, called *Many Wells*, and sect. 49 provided that "It shall not be lawful for any person other than the company to divert, alter, or appropriate in any other manner than by law they may be legally entitled, any of the waters supplying or flowing from certain streams and springs called '*Many Wells*,' . . . or to sink any well or pit, or do any act, matter, or thing whereby the waters of the said springs might be drawn off or diminished in quantity." The Act contained no provision for compensating landowners whose rights might be affected by this section. The company accordingly appropriated the water of the *Many Wells Springs*, and the Plaintiffs continued to do so.

The Defendant, who owned land adjoining the *Many Wells Springs*, proposed to construct on his own land an underground drift or tunnel, the effect of which would be seriously to diminish, if not to cut off entirely, the flow of water at the springs. His professed object in doing this was to drain some beds of stone lying under his land, so that he might be able to work them. The Court came to the conclusion on the evidence that the Defendant was not acting *bonâ fide*, and that his real object was to force the Plaintiffs to buy him off:—

Held, that what the Defendant proposed to do was prohibited by sect. 49, and that an injunction must be granted to restrain him from making the tunnel:

But *held*, that, if the Defendant had been legally entitled to construct the tunnel, he could not have been restrained from doing so on the ground that he was actuated by a malicious or improper motive.

TRIAL OF ACTION.

The Plaintiffs claimed an injunction to restrain the Defendant, his servants, &c., from making or continuing to use a certain drift or tunnel in his own land, and from permitting to remain or from further sinking a certain shaft, and from making or continuing any other works, or doing any other act, matter, or thing whereby the waters of the *Many Wells Springs*, in *Trooper* or *Many Wells Farm*, in the parish of *Bradford*, *Yorkshire*, and a

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stream called *Hewenden Beck*, flowing through the Defendant's and the Plaintiffs' land, might be drawn off or diminished in quantity, or polluted or injuriously affected, and from in anywise interfering with the Plaintiffs' right to the said waters.

By an Act (5 & 6 Vict. c. vi.) passed on the 22nd of April, 1842, the *Bradford Waterworks Company* were incorporated for supplying the town and neighbourhood of *Bradford, Yorkshire*, with water, and were authorized to purchase the works of a previously existing company, which they shortly afterwards did. The new company were authorized to acquire lands for the purposes of their undertaking, and to construct works according to a plan deposited with the Clerk of the Peace.

Sect. 196 provided "that, if the owner, lessee, or occupier of any mines or minerals lying under the said works, or within forty yards therefrom, be desirous of working the same, such owner, lessee, or occupier shall give to the company notice in writing of his intention so to do thirty days before the commencement of working; and upon the receipt of such notice it shall be lawful for the company to cause such mines to be inspected by any person appointed by them for the purpose; and if it appear to the company that the working of such mines or minerals is likely to damage their works, and if the company be willing to make compensation for such mines to such owner, lessee, or occupier thereof, then he shall not work or get the same; and if the company and such owner do not agree as to the amount of such compensation, the same shall be settled as in other cases of disputed compensation."

Sect. 233 provided that, "subject to the restrictions and provisions in this Act, it shall be lawful for the company from time to time to divert or alter the course of . . . *Hewenden Beck* . . . and also to divert and to take the water from . . . the springs and streams of water called '*Many Wells*' arising or flowing in and through . . . *Trooper* or *Many Wells Farm*, situated in the township of *Wilsden*, in the parish of *Bradford*."

Sect. 234 contained provisions identical with those of sect. 49 of an Act of 1854, which will be presently stated.

The Act of 1842 also contained provisions imposing upon the company the necessity of making at great expense a reservoir

for compensating the owners of mills and manufactories upon *Hewenden Beck* (into which the waters from the *Many Wells Springs* had flowed) before they diverted any part of those streams.

The company accordingly proceeded to execute the works thus authorized, and, after purchasing the lands and completing the reservoir, they took for their waterworks the water of the *Many Wells Springs*.

Hewenden Beck ran in a northerly direction, down a valley on the west or left side of which the land gradually rose to a considerable height. In the bottom of this valley *Hewenden Reservoir* was constructed. The *Many Wells Springs* were a group of springs suddenly issuing from the hillside to the west of the valley, at the height of between thirty and forty feet above the level of the water of the reservoir, with an outlying spring rising at a spot called the *Watering Place* (there being an old trough there for the use of cattle), lying about two feet higher than, and about six chains to the south of, the *Many Wells Springs* proper. About forty or fifty yards to the west of *Many Wells*, and higher up the slope, was a public road called *Dolls Lane*, which extended to and passed close by the *Watering Place*. Before the company's works were executed the waters issuing from these sources ran down the slope of the hill to *Hewenden Beck* in open defined courses. In January, 1843, the company purchased the whole of the land extending eastward from *Dolls Lane* to and beyond *Hewenden Beck*, including the sites of the *Many Wells Springs*, and extending up to, but not including, the *Watering Place*. They then constructed stonework conduits, and a basin or well of masonry at *Many Wells*, to gather the waters of the spring there, and they intercepted the water which rose at the *Watering Place* as it entered their land, between fifty and sixty feet from the old trough, by placing there a second trough, and they conveyed it thence in a pipe to *Many Wells*, and the waters thus gathered were carried in mains to *Bradford*.

The upper strata of the soil in the neighbourhood of *Many Wells* constituted what is called the "millstone grit," consisting in the main of sandstones of various kinds, lying in beds with a great many cracks and fissures through them, at all angles with

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the lie of the beds, which were thus rendered very pervious to water. Many of these crevices and fissures were so large and plainly marked as to be visible to the eye in photographs which were put in evidence in this action. At the bottom of the millstone grit strata of indurated clay and shale were found, forming a watertight floor or bed. All these strata were intersected by two main faults running practically east and west, the position of which on the surface was well known. They appeared to be vertical, or very nearly so. The line and nature of the northern fault were well ascertained: it was a down-throw to the north of from 144 feet to 160 feet. It was almost, if not quite, impervious to water, being composed of tough clay; but to make that barrier still more perfect the Corporation of *Bradford* in 1866 purchased a strip of the coal on its north side, to prevent its sufficiency as a watertight barrier from being impaired by mining. It was well known that on the north side of the fault the soil was free from water down to a level far below that at which the *Many Wells Springs* issued from the hillside. The southern fault was between 300 and 400 yards further to the south, the *Many Wells Springs* being between the two faults and about equidistant from them. Of this southern fault very little was known except its direction on the surface, where it had the millstone grit on both sides, and that it produced, like the other, a down-throw to the north. But the extent of the down-throw was merely matter of conjecture. All parties seemed to agree that this fault must be of similar character to the northern fault. Some of the witnesses said that it was impossible to be certain where the water at *Many Wells* came from. But the quantity of water rising from the springs was at once very largely increased when heavy rain fell, and most of the witnesses suggested that the rain falling on the higher land to the west sank into the earth, and saturated the lower measures of the millstone grit down to the clay and shale through which it could not pass; it then found its way downwards through the openings in the sandstone, the dip of which was slightly towards the east or north-east, and then, as the shale got nearer its outcrop (the surface dipping to the east more rapidly than the strata below), the water, which was prevented by the faults on either side from getting away to the north or south,

found its way out on the side of the hill near the junction of the different strata. This was the conclusion at which Mr. Justice *North* arrived.

By reason of the very rapid increase of the town of *Bradford* a better supply of water became of urgent importance, and in the year 1854 another Act (17 & 18 Vict. c. cxxiv.) was passed for that purpose. With this Act the *Waterworks Clauses Act*, 1847, was incorporated. By this Act of 1854 the company formed in 1842 was dissolved, and a new company was incorporated with the same name, and the Act of 1842 was repealed. All the property and rights and privileges of the old company were by the same Act vested in the new company, including in express terms the "springs of water called *Many Wells*, in *Trooper* or *Many Wells Farm*."

By s. 49: "It shall not be lawful for any person other than the company to divert, alter, or appropriate in any other manner than by law they may be legally entitled, any of the waters supplying or flowing from certain streams and springs called '*Many Wells*,' arising or flowing in and through a certain farm called *Trooper* or *Many Wells Farm*, in the township of *Wilsden*, in the parish of *Bradford*, or to sink any well or pit, or do any act, matter, or thing whereby the waters of the said springs might be drawn off or diminished in quantity; and if any person shall illegally divert, alter, or appropriate the said waters or any part thereof, or sink any such well or pit, or shall do any such act, matter, or thing whereby the said waters may be drawn off or diminished in quantity, and shall not immediately, on being required so to do by the company repair the injury done by him, so as to restore the said springs and the waters thereof to the state in which they were before such illegal act as aforesaid, he shall forfeit to the company any sum not exceeding £5 for every day during which the said supply of water shall be diverted or diminished by reason of any work done or act performed by or by the authority of such person, in addition to the damage which the company may sustain, by reason of their supply of water being diminished." The Act contained no provision for compensating landowners whose rights might be affected by this section.

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By the *Waterworks Clauses Act*, 1847 (10 & 11 Vict. c. 17), s. 14: "After the streams or supplies of water hereby or by the special Act authorized to be taken by the undertakers shall have been so taken, every person who shall illegally divert or take the waters supplying or flowing into the streams so taken, or any part thereof, or who shall do any unlawful act whereby the said streams or supplies of water may be drawn off or diminished in quantity, and who shall not immediately repair the injury done by him, on being required so to do by the undertakers, so as to restore the said waters to the state in which they were before such act, shall forfeit to the undertakers any sum which shall be awarded in *England* or *Ireland*, by two justices, and in *Scotland* by the sheriff, not exceeding £5 for every day during which the said supply of water shall be diverted or diminished by reason of any act done by or by the authority of such person, and any sum so forfeited shall be in addition to the sum which he may be lawfully adjudged liable to pay to the undertakers for any damage which they may sustain by reason of their supply of water being diminished; and the payment of the sum so forfeited shall not bar or affect the right of the undertakers to bring or raise an action at law against such person for the damage so committed."

By the *Bradford Corporation Waterworks Act*, 1854 (17 & 18 Vict. c. cxxix.), which was passed on the same day as the last stated Act of 1854, the Corporation of *Bradford* were authorized to purchase the whole undertaking of the *Bradford Waterworks Company*, and they shortly afterwards did so, and the undertaking, with all the rights, powers, and privileges of the company, became thereupon vested in the corporation. The *Waterworks Clauses Act*, 1847 (with the exception of sects. 75 to 83), was incorporated with that Act.

Two other Acts were obtained by the corporation in the years 1868 and 1873 respectively. The Acts prohibited the pollution of the water of the corporation, but did not deal with its permanent abstraction.

The Defendant, who owned a property of about 140 acres which adjoined the land of the corporation, at one time worked a quarry upon his land, at a point considerably higher than

Many Well Springs, but he ceased to work it because of some fault in the stone.

In 1889 or early in 1890 the Defendant sank a shaft in his land at a point a little to the south of the southern fault. He called this a "trial shaft." The sinking of this shaft occupied some time. Twice during the work water occurred, but a bore-hole was made below the bottom, and the water disappeared. When the sinkers got about eighty feet down, water again occurred and then a further bore-hole was made thirty-three feet lower, but without getting rid of the water. The Defendant, in August, 1890, consulted a Mr. *Woodhead*, an engineer, who suggested the making of a drift or tunnel in the shale, 600 yards in length, to commence at a point five feet below the bottom of the bore-hole (*i.e.*, about 118 feet below the surface), and the water, after issuing from the drift, was to be carried down to the *Beck*, to the north of or below the reservoir, by an open drain, constructed for the purpose, 285 yards in length. On the 5th of December, 1891, a notice was given by the Defendant to the Plaintiffs that it was his intention, after the expiration of thirty days from the service thereof, to work the mines and minerals lying under the surface of his lands, by sinking the pits or shafts, and driving the drift or tunnel, and making and constructing the drain, shewn on a plan attached thereto, in the direction and at the levels and otherwise in accordance with the plan and the sections thereon, and for the purpose of this working of his mines and minerals to do all such other works as might be necessary, and to drain the same by means of engines or otherwise. The notice also stated that it was given out of courtesy, and was not to be deemed an admission by the Defendant of any right on the part of the Plaintiffs to have such a notice under the provisions of the *Waterworks Clauses Act*, the *Bradford Corporation Waterworks Acts*, or any other statutes whatever.

The plan attached to the notice shewed that the tunnel was to commence from the trial shaft above mentioned (which was called No. 1), *i.e.*, that the highest level in the tunnel was to be there, and that it was gradually to fall thence at the rate of four feet in the mile. It was to be three feet wide by three feet high. It was necessary in order to keep within the Defendant's land that

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it should pass close to a farm called *East Many Wells*, where the course of the tunnel changed from north to east, and at this point a shaft was to be made, which was called No. 3. The tunnel was not laid out in the nearest line from No. 1 to No. 3. It was laid out in a straight line in a north-easterly direction from No. 1 to a point near the *Many Wells Springs*, marked on the plan as the site of a shaft No. 2. Thence it turned off at an angle of about thirty-eight degrees and ran straight to No. 3 shaft, which lay about due north of No. 2. The result of this was, that No. 2 shaft was placed very near to the *Many Wells Springs*, being forty yards six inches from that part of the Plaintiffs' masonry about the springs which rose above the surface of the ground. This brought the Defendant's tunnel at this point ninety yards further to the east, and nearer to *Many Wells Springs*, than it would have been if it had been laid out in a straight line from No. 1 to No. 3, and increased the length of the tunnel between those points to 525 yards, the distance between No. 1 and No. 3, in a direct line being 485 yards only.

The Defendant, on the 27th of January, 1892, entered into a contract for the construction of these works according to the plan, and the works were commenced. After some correspondence, the writ in this action was issued. The No. 2 shaft was commenced early in 1892, and had, before the trial of this action, been sunk to a depth of about forty-one feet. A bore was also made a little way further down by means of a plunger. This shaft was intended to be sunk to the depth of eighty-one feet, and at that point, according to the evidence, it would have been about twenty-eight feet lower than the outflow of the *Many Wells Springs*. The evidence shewed that, though the site of this shaft was distant about forty yards and six inches from the visible stone walls of the Plaintiffs' basin, it was in fact only a little over thirty yards distant from some underground artificial conduits which had been constructed fifty years ago, and which collected the water from the springs and brought it into the Plaintiffs' basin.

The evidence shewed that as soon as, and whenever, the plunger in the bore-hole was worked, the water in the Plaintiffs' basin was at once polluted, and filled with sand in suspension, to such

an extent that it was rendered quite unfit for use, and had to be turned off from the main.

Cozens-Hardy, Q.C., *B. Eyre*, and *C. M. Atkinson*, for the Plaintiffs:—

(1.) That which the Defendant proposes to do is prohibited by sect. 234 of the Act of 1842, sect. 49 of the Act of 1854, and also by sect. 14 of the *Waterworks Clauses Act*, 1847.

(2.) The Defendant's intended drift or tunnel will also be a violation of the Plaintiffs' common law right. It is true that a landowner cannot prevent an interference with underground water, percolating under his land but not in any defined channels, when that interference is caused by a neighbouring landowner dealing with underground water in his own land. But it is equally well settled that a landowner cannot interfere with water running in a defined channel on his neighbour's land, either on the surface or underground: *Grand Junction Canal Company* v. *Shugar* (1). It is clear that the water now runs in a defined channel over the Plaintiffs' land, and the evidence shews that it flowed in a defined channel even before the pipes were laid down.

(3.) Under sects. 22 and 23 of the *Waterworks Clauses Act*, 1847, the Defendant has a right to work his mines upon giving notice to the Plaintiffs, "so that the mines be not worked in an unusual manner." The plan which the Defendant sent with his notice of the 5th of December, 1891, of his intention to work his quarries, shews that the mode in which he proposes to work them is an unusual one. The line of his proposed drift is a most extraordinary one if it is designed only for the purpose of draining the quarries.

(4.) The Defendant's scheme is not a *bonâ fide* one, but it was put forward with the intention of compelling the Plaintiffs to purchase the Defendant's land, or to compensate him. In order to justify the mineowner's notice, there must be a *bonâ fide* intention to work his mine: *Midland Railway Company* v. *Robinson* (2). Moreover, the evidence shews that there is not any merchantable stone in the quarries. Further, the Defendant is in fact going

(1) Law Rep. 6 Ch. 483. (2) 15 App. Cas. 19, 32.

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to do something quite different from his plan, so that really he has not given the Plaintiffs any notice at all.

Everitt, Q.C., *Tindal Atkinson*, Q.C., and *Butcher*, for the Defendant:—

The evidence proves that the whole of the soil of *Doll Lane* belongs to the Defendant.

If the water formerly flowed in a defined channel it was an artificial channel, not a natural one. Consequently, *Grand Junction Canal Company* v. *Shugar* (1) does not apply. A landowner has a right to dig on his own land: *Chasemore* v. *Richards* (2). There is nothing to prevent a landowner from interfering with underground percolating water on his own land which afterwards at some distance finds its way to the surface, and then flows in a defined channel through his neighbour's land. He could not, of course, directly cut that channel.

[NORTH, J.:—Do you say that you could dig a well on your land seven feet above the Plaintiffs' trough, and carry away the water which would otherwise have flowed into the trough?]

Yes, if it is underground percolating water. The argument applies with greater force where what the Defendant is doing is at a place more than 200 yards distant from the Plaintiffs' watering-place. A landowner is entitled to do what he pleases on his own land, provided that he does not interfere with water flowing in a defined natural channel: *Chasemore* v. *Richards* (3). He has a right to appropriate percolating water before it reaches a defined channel, even though the effect of his so doing may be to diminish the flow of water in that channel. It is immaterial what his motive is: *Rawstron* v. *Taylor* (4). But the Defendant repudiates the motive attributed to him by the Plaintiffs.

The application for an injunction to protect a common law right is premature, for it is at present uncertain whether what the Defendant proposes to do will affect the flow of water in the defined channel.

The Plaintiffs have no such statutory rights as they claim. As regards the limit of forty yards, the statute is not pleaded.

(1) Law Rep. 6 Ch. 483.
(2) 7 H. L. C. 349.
(3) 7 H. L. C. 366, 376, 388.
(4) 11 Ex. 369.

In *Midland Railway Company* v. *Robinson* (1), the question was whether the right to work "mines and minerals" given by sect. 78 of the *Railways Clauses Act*, 1845, included open or surface workings.

Private Acts of Parliament ought to be construed very strictly. *Primâ facie* such Acts are not intended to affect any rights of property, or any other common law right of a landowner whose land is not taken by the undertakers and who is not compensated in any way for the abridgment of his rights. If the words are clear, and there is a provision for compensating landowners, the Court will the more readily conclude that the undertakers are entitled to a statutory right which they claim against a landowner: *Lamb* v. *North London Railway Company* (2); *London and North Western Railway Company* v. *Evans* (3).

Sect. 234 of the Act of 1842 and sect. 49 of the Act of 1854 only impose penalties for the purpose of protecting the land which the company have acquired and the springs of water upon it.

[NORTH, J.:—Those sections forbid the doing of certain specified things, and a penalty is imposed for doing any of those things.]

The prohibition applies only to water flowing in a defined channel, not to percolating water: *Holliday* v. *Mayor of Wakefield* (4). Moreover, the sections apply only to some act illegally done upon the Plaintiffs' own land. They do not affect the rights of outside landowners. Sect. 49 of the Act of 1854 is a re-enactment of sect. 234.

Cozens-Hardy, in reply:—

Sect. 49 of the Act of 1854 is not limited to acts done upon the Plaintiffs' land, and it contains an absolute prohibition of that which the Defendant proposes to do. When the Act of 1842 was passed, *Chasemore* v. *Richards* (5) had not been decided. In fact, it was not decided till 1859.

[NORTH, J.:—*Acton* v. *Blundell* (6) was decided in 1843.]

(1) 15 App. Cas. 19.
(2) Law Rep. 4 Ch. 522.
(3) [1893] 1 Ch. 16.
(4) [1891] A. C. 81.
(5) 7 H. L. C. 349.
(6) 12 M. & W. 324.

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In *Chasemore* v. *Richards* (1), *Dickinson* v. *Grand Junction Canal Company* (2) was disapproved.

Sect. 14 of the *Waterworks Clauses Act*, 1847, would be meaningless if the Defendant is right.

The Defendant never had an honest intention to work the stone; the mere expression of a desire to work is not sufficient.

The evidence proves that the water formerly flowed in a defined channel; the Plaintiffs or their predecessors have altered its course, but that alteration cannot affect their right: *Bower* v. *Sandford* (3); *Dudden* v. *Guardians of Clutton Union* (4).

1894. May 9. NORTH, J. (after stating the facts to the above effect, and referring to the evidence, continued):—

The witnesses on both sides agree that there is no case producible in which a drift of any kind has been made to drain the water from stone before the stone has been proved and tested by actual working, much less by a tunnel of such an extent and cost as is proposed in this case, which, so far as the evidence goes, is quite an unprecedented operation for such a purpose.

The result of the construction of such a drift as is proposed does not, I think, admit of any doubt. If a circular tunnel, one yard in diameter, is constructed past the *Many Wells Springs*, at the depth of twenty-eight feet below the level at which those springs flow out at the surface, and a distance (measured horizontally) of not more than thirty yards at the most from the point at which the waters which feed those springs are flowing in a defined subterranean channel, I have no doubt whatever that the water will be carried off by the tunnel, and will cease to rise to the *Many Wells Springs* as heretofore. Mr. *Woodhead* says that the object contemplated was to rid the Defendant's stone of the water, regardless of whose it was or where it came from; that he did not take into consideration the *Many Wells Springs* or the Plaintiffs' works; that he did not know that the tunnel would affect them, and that, though he cannot deny that there was a certain risk of it, he does not remember whether it was present to his mind or not. I think that the real facts must

(1) 7 H. L. C. 349.
(2) 7 Ex. 282.
(3) 5 Times L. R. 570.
(4) 1 H. & N. 627.

have escaped his memory. I do not believe that it was by accident that the site for No. 2 shaft was located a few inches over forty yards from the Plaintiffs' visible works, or that the notice of the 5th of December, 1891 (on the plan annexed to which Mr. *Woodhead's* name appears), was given without his knowledge, or that he was so incompetent as to have overlooked the possible or certain effect upon the *Many Wells Springs* of the works which he had designed. I am quite satisfied that the tunnel was deliberately planned to carry off the water which had previously issued from the *Many Wells Springs*, and also that the desired result would have been successfully accomplished by it.

These being the conclusions of fact at which I have arrived as the result of the evidence, it remains to be considered how far the Defendant is interfering with the Plaintiffs' legal rights. In my opinion, what the Defendant is proposing to do is forbidden by sect. 234 of the Act of 1842, and by sect. 49 of the Act of 1854, which now takes the place of the former section. The Defendant is "doing an act or thing by which the water of the springs will be drawn off or diminished in quantity," and not merely diminished, but wholly abstracted. It is said that the Defendant is only forbidden by that section from diverting, altering, or appropriating the water in question in any other manner than by law he is legally entitled, and that, as he is legally entitled to drain his own land in order to get his stone, diversion for that purpose is not forbidden. But that argument ignores and deprives of meaning the subsequent part of the section, which goes on to make unlawful something besides that which is already forbidden—viz., the sinking of any well or pit, or the doing of any act or thing whereby the waters of the springs may be drawn off or diminished in quantity—and, if the words "in any other manner than by law they may be legally entitled" are read as modifying all that follows, it makes the section enact that a man is not to do certain specified things except so far as he may lawfully do them; which is making nonsense of it. I think that the section is not very happily expressed; but in my opinion the opening provision is intended to preserve as against the waterworks company such rights over the waters in question as an upper riparian proprietor has against a lower riparian

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proprietor in an open stream; permitting a diversion or alteration, or even an appropriation to a limited extent, but not a diversion or appropriation by way of abstraction of the whole. I cannot say that this construction gives a clear or satisfactory meaning to every phrase and word used in the section; but it seems to me preferable to a construction which makes the section say that it is to be illegal to do certain things except so far as it is legal to do them. And it is, perhaps, not wholly immaterial to observe that when sect. 234 of the Act of 1842 (from which sect. 49 of the Act of 1854 is transferred) was passed, the great case of *Acton* v. *Blundell* (1) had not been decided, and the differences between the rights in waters flowing in a defined course and other waters were not so well ascertained as they have since been. Some reference was made to the provisions of the *Waterworks Clauses Act*, but I think the provisions of sect. 49 of the Act of 1854 are much stronger against the Defendant than anything to be found in the general Act.

Particular reference was made to sects. 196 to 200 in the Act of 1842, and sects. 22 to 26 in the *Waterworks Clauses Act*; and I believe that it was in consequence of those sections that No. 2 shaft was planted just over forty yards (as was believed) from the Plaintiffs' works, and the notice of the 5th of December, 1891, was expressed to be given out of courtesy only, but that that notice was in fact given to provide against the contingency of that shaft proving to be within forty yards of those works, as turned out to be the case. But I do not think that these sections have any application. They deal with the case of possible interference by mining with the support to the necessary reservoirs, buildings, pipes, or other works for collecting the water, conveying it to *Bradford*, and distributing it there, none of which it is suggested that the Defendant's tunnel will let down; but they have no reference to the abstraction of the water by the Defendant before it has entered the Plaintiffs' works at all.

Then it was said for the Defendant that sect. 49 is only intended to apply to acts done by the waterworks company, or persons claiming under them, or at any rate to acts done upon their land. But I see no ground for this. It would be absurd

(1) 12 M. & W. 324.

to say that the section is merely aimed at preventing the Plaintiffs from doing acts to their own prejudice, or forbidding such acts from being done by trespassers on the Plaintiffs' land. Its object must be to prevent such acts being done to the injury of the Plaintiffs by any other persons.

It was also argued by the Defendant's counsel that it cannot be the meaning of the Legislature that he should be restrained from utilizing his stone in the way in which he could otherwise lawfully have done, when no provision is made for compensating him for the loss thus cast upon him, as this would amount to gross injustice; and the observations of Lord Justice *Bowen* in *London and North Western Railway Company* v. *Evans* (1) are relied upon. There are many such decisions to be found in the books; and there was especially an important decision by Lord *Esher* to that effect not long ago which I have been unable to find reported. This is a very weighty argument. At the same time that result must follow if the Act says so, as I think it does in the present case. But I am not satisfied that this will produce any injustice to the Defendant, as I do not see how this construction of the Act passed in 1842 does deprive him of anything which was of the slightest value. What appreciable value could possibly then have been attributed to the stone which the Defendant says he is now prevented from working by such a construction of the section? Nay, more, there is no evidence before me that at the present moment any person would pay anything for the right to get whatever stone may be found in the Defendant's land below the level of the *Many Wells Springs*. [His Lordship referred to the evidence on this point, and continued:—] I come to the conclusion that, if I had now to say what compensation should be awarded to the Defendant in consequence of his not being allowed to make the tunnel, I should be unable to say that there was any damage entitling him to compensation.

But a second ground for relief was put forward by the Plaintiffs which gave rise to serious discussion. It was said that, assuming that the Defendant could not be restrained from making the tunnel, if it were done *bonâ fide* for the legitimate purpose of

(1) [1893] 1 Ch. 28.

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getting the stone under his land, notwithstanding that the result would be to drain the *Many Wells Springs*, still he ought to be restrained, because his object is not to get his own minerals but to injure the Plaintiffs by carrying off the water, and compelling them to buy him off in order to avert this. This argument was strenuously urged before me, and, as the case may go further, I feel bound to put on record my view of the facts. I have come to the conclusion upon the evidence that this charge against the Defendant is well founded, and that his operations are intended for the drainage of his stone, not in order that he may be enabled to work it, but in order that the Plaintiffs may be driven to pay him not to work it. There are many things which lead me to this conclusion. [His Lordship referred to the evidence, and continued :—]

These are the principal grounds which have led me to the conclusion that the Defendant has not been acting in good faith in this matter, and that the avowed ground for the construction of the drift is not the true reason.

It remains to consider whether, the facts being as I have just stated, the Defendant can be restrained from making the tunnel proposed, on the ground that he is not acting *bonâ fide*. No case in their favour, directly or nearly in point, was cited to me by the Plaintiffs' counsel, and I have not been able after much research to find one for myself. Indeed, there seems to me to be great dearth in the law of *England* of authority upon the point. Going back to the civil law, from which so much of our law as to servitudes and easements is derived, a passage often quoted with approval is much in point. In the Digest, lib. xxxix. tit. 3 (1), "*De aquâ et aquæ pluviæ arcendæ*," I find: "*Denique Marcellus scribit, 'Cum eo, qui in suo fodiens, vicini fontem avertit, nihil posse agi; nec de dolo actionem, et sane non debet habere; si non animo vicino nocendi, sed suum agrum meliorem faciendi, id fecit.'*" That passage certainly does indicate that an action might lie, if the act damaging the neighbour was done, not for the improvement of the actor's own property, but for the purpose of levying blackmail upon the neighbour. In *Acton* v. *Blundell* (1) Mr. Justice *Maule*, referring

(1) 12 M. & W. 324.

to that passage, which had been quoted during the argument, said (1): "It appears to me that what *Marcellus* says is against you. The English of it I take to be this: 'if a man digs a well in his own field, and thereby drains his neighbour's, he may do so, unless he does it maliciously.'" And the same passage in the Latin is quoted in full (2) in the considered judgment of the Court of Exchequer Chamber in that case. This certainly is an approval and adoption of that passage as an authority. But it must be observed that in that case there was no suggestion that the defendant was acting maliciously in working his coal mine, and the citation and approval were with reference to the first part of the proposition as to what might lawfully be done, not with reference to the suggestion of what might be unlawful in a state of facts not before the Court. I cannot find any case in the books in which the latter part of the statement has been affirmed, or acted upon, in this country. On the other hand, in *Rawstron* v. *Taylor* (3), where counsel referred to a diversion of water as being for the *bonâ fide* purpose of drainage only, and not for profit, Baron *Martin* said (4): "The proprietor of the soil has *primâ facie* the right to drain his land; and unless there is some express authority to shew that his motive in so doing affects the question, in my opinion the motive is altogether immaterial," and no such authority having been produced, he repeated the same opinion in his judgment. Again, in *Chasemore* v. *Richards* (5), Lord *Wensleydale* says (6): "The civil law deems an act, otherwise lawful in itself, illegal if done with a malicious intent of injuring a neighbour, *animo vicino nocendi*. The same principle is adopted in the laws of *Scotland*, where an otherwise lawful act is forbidden 'if done *in æmulationem vicini*'; but this principle has not found a place in our law."

Mr. *Cozens-Hardy* placed much reliance upon some observations of Lord Justice *Cotton* and Lord *Herschell* in *Midland Railway Company* v. *Robinson* (7); but I do not think they help the Plaintiffs. In that case questions arose as to rights depending

(1) 12 M. & W. 336.
(2) Ibid. 353.
(3) 11 Ex. 369.
(4) 11 Ex. 378.
(5) 7 H. L. C. 349.
(6) Ibid. 388.
(7) 37 Ch. D. 397; 15 App. Cas. 32.

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upon the effects of a notice given by an "owner lessee or occupier . . . desirous of working" mines and minerals under a railway, and the question, whether the person giving the notice really did desire to work, or was actuated by some other motive, went to the very root of the matter; whereas in the present case the motive of the Defendant is, according to the cases which I have referred to, not material.

Under these circumstances, I come to the conclusion that the Plaintiffs are not entitled to relief on this second ground.

The Plaintiffs also relied upon *Grand Junction Canal Company* v. *Shugar* (1). But, as I read that case, it was one in which subterranean water had passed into a defined channel, from which it was subsequently abstracted, and in that respect it differs from the present case. Here the water has long flowed in defined streams from the *Many Wells* proper, and from the *Watering Place*; and I think that the Plaintiffs' rights are just the same as those of the water company immediately after their purchase in 1843, for the fact that they intercept the springs at their fountain-head is not material: see *Dudden* v. *Guardians of Clutton Union* (2); *Bower* v. *Sandford* (3). But, as the effect of the Defendant's acts would be, not to take out of any defined channels water which had once reached them, but to intercept the water before it has reached those channels, *Grand Junction Canal Company* v. *Shugar* does not govern the present case.

The Plaintiffs also made it a great point that the Defendant could have drained his stone, if that was his real object, as effectively and much more cheaply by a short drift to the *Watering Place* or to the *Hewenden* reservoir. But there are considerable difficulties about this view; and I am not satisfied that any conclusion can fairly be drawn from it as to want of good faith on the part of the Defendant; and, if I thought he was acting in good faith and within his rights, I could not restrain him from adopting his own mode of drainage, which he preferred, merely because other persons considered some other method to be cheaper and more effectual. [After dealing with a subordinate point, his Lordship proceeded:—]

(1) Law Rep. 6 Ch. 483. (2) 1 H. & N. 627.
(3) 5 Times L. R. 570.

I must therefore grant an injunction to restrain the Defendant, his servants, workmen, and agents, from making or continuing the drift or tunnel, and from constructing any other works, or doing any other act, matter, or thing whereby the waters of the *Many Wells Springs*, or of the stream flowing at the *Watering Place*, may be drawn off or materially diminished in quantity or polluted. I add the word "materially," though it is not found in the Act, because I think that the Act does recognise the possibility of some legal appropriation by the Defendant of water supplying the springs. Moreover, the principle "*De minimis non curat lex*" applies to the case.

The question of costs is a very serious matter. Of course the Plaintiffs are entitled to the general costs of the action. But a very considerable amount of time and money has been expended upon the question of the *bona fides* of the Defendant, with respect to which the Plaintiffs have failed although the Defendant has not been successful. It would be impossible for any Taxing Master to distinguish or apportion the costs with any approach to accuracy; and I think that, having heard the case, I can deal with them much better myself. I therefore take upon myself to direct that the Plaintiffs' costs shall be taxed, and order that the Defendant do pay to the Plaintiffs half of the amount so taxed. If any authority for such an order is desired, it will be found in *Willmott* v. *Barber* (1).

Solicitors: *Cann & Son*, agents for *W. T. McGowen, Bradford; Ullithorne, Currey, & Villiers*, agents for *W. & G. Burr & Co., Keighley.*

(1) 17 Ch. D. 772.

W. L. C.

STIRLING, J.

1894

June 1.

J. *v.* S.

[1893 J. 1709.]

Partnership—Partner of Unsound Mind—Pending Action for Dissolution—Interference with Business—Injunction—Jurisdiction.

Where an action is pending for the dissolution of a partnership on the ground that the defendant partner is of unsound mind, the Court will grant an injunction to restrain the defendant from interfering in the conduct of the partnership affairs so as to injure the business and assets of the firm.

Motion.

This action was brought by one of two partners against his co-partner alleging that the Defendant partner was of unsound mind, and claiming a dissolution of the partnership on that ground. The action came on for trial on the 9th of May, 1894. Upon the evidence adduced at the trial, the Judge was satisfied that the Defendant was at that time of unsound mind. But he was not satisfied that the Defendant was permanently insane, and he directed the action to stand over until after the Long Vacation in order to ascertain whether the Defendant's mental condition would improve. Since the trial of the action the Defendant, who was under medical treatment and in the charge of a keeper, had attempted to assert his rights as partner both by drawing cheques against the partnership account, and also by going to the partnership premises and claiming to take a part in the conduct of the business.

Under these circumstances the Plaintiff, on the 29th of May, applied for and obtained an interim injunction restraining the Defendant from dealing with the partnership assets, and from issuing bills or notes, or drawing cheques in the name of the firm, and from going to or remaining on the business premises, or from in any way interfering with the partnership business; and he now moved for an order continuing that injunction until judgment in the action or further order.

It appeared from the evidence that the medical attendant of

the Defendant on the 28th of May stated to the Plaintiff in answer to a question that, in his opinion, the Defendant was not in a fit condition to be about, and that he had written to the Defendant's father informing him that the Defendant must be put under more efficient control and restraint, as he could not take the responsibility any longer.

Hastings, Q.C., and *Robertson-Macdonald*, for the Plaintiff:—

The Court has jurisdiction to restrain a lunatic partner from interfering in the partnership affairs in such a manner as to injure the business: *Anonymous* (1). And in case of disobedience to an order on the part of an alleged lunatic, it will direct a writ of attachment to issue against him: *In re B.* (2).

Ribton, for the guardian *ad litem* of the Defendant:—

The Court cannot grant an injunction against a person of unsound mind. *Anonymous* is no authority for the Plaintiff's contention, as no injunction was there granted. So far as that contention is concerned, the case contains only a *dictum* by Lord *Hatherley*. The point as to whether an injunction could be granted against a lunatic was not argued, and it is evident that counsel in that case felt considerable difficulty in asking for such relief.

Supposing the Court were to grant an injunction, the breach of it would involve committal. But there could be no committal of a lunatic, because there could be no wilful or contemptuous breach of the injunction by him. The Defendant has now been placed in a private retreat with the sanction of the proper authorities. I submit that the Court has no jurisdiction to grant an injunction under these circumstances.

Hastings, in reply:—

There is abundant authority to justify the Court in preventing a partner, whether lunatic or sane, from destroying the partnership business. In *Anonymous*, Lord *Hatherley* said that if the defendant had been of unsound mind he would have interfered by injunction directly. In *In re B.* (2), the Lords Justices

(1) 2 K. & J. 441.

(2) [1892] 1 Ch. 459.

STIRLING, J. 1894 J. v. S.

assumed that a writ of attachment would issue against the alleged lunatic for disobeying the order of the Court. In *Robinson* v. *Galland* (1), Mr. Justice *Chitty* granted leave to issue a writ of sequestration against a person of unsound mind for disobedience to an order.

[STIRLING, J.:—Is there any case in which an injunction has actually been granted against a lunatic?]

No. The necessity for such an order is usually prevented by the friends of the lunatic taking care of him.

STIRLING, J. (after stating the facts, continued):—

I infer from the evidence that the Defendant's condition has not improved since the time of the trial on the 9th of May. I therefore come to the conclusion that he is still suffering from insanity. The question then is, Can I, in that state of things, grant an injunction against a lunatic? It is not clear, at the present moment, in the view which I take of the evidence, that a dissolution will be granted. Therefore, the case comes to this—Will the Court interfere to restrain one partner, who is committing acts which are injurious to the partnership, and committing them, not wilfully, but by reason of his being in a state of unsound mind? The acts complained of appear to me to be injurious to the partnership, and to the interest of the Defendant in it. According to law, a person of unsound mind, not so found, may be sued, and judgment may be recovered against him; and a proper order may be made against him at the trial of the action, notwithstanding his insanity. Why may not, during the pendency of an action for dissolution of partnership, a proper order be made against the lunatic to prevent him, a person of unsound mind, from committing acts injurious to his co-partner as well as himself? I cannot see. It is well settled now that an injunction may be granted in a partnership action although no dissolution is sought. Therefore, even although the Court should not grant the Plaintiff's application and order a dissolution at the trial, yet, it seems to me, in the case of an injury to the partnership property, the Court may well interfere,

(1) 5 Times L. R. 504.

to the best of its power, by making a proper order against the Defendant, although unhappily he is of unsound mind. On general principles, therefore, it seems to me that, for the protection of the partnership and the partnership assets, the Court may and ought to interfere. There is very little authority on the question; but there is a *dictum* of Lord *Hatherley*, when Vice-Chancellor, in an anonymous case, in which he says (1) that, if the Court had "felt it right to come to an immediate conclusion upon the case in July last, its conclusion, upon the evidence as it was then presented, would have been that the defendant ought to be restrained from interfering in the partnership affairs." That is an authority in favour of the application here.

It is suggested that, if I make the order, there may be difficulties as regards the enforcing of it; but, on the present occasion, I do not think it is necessary for me to go into that, because in the two cases which have been cited a remedy has been found for disobedience to an order, or neglect on the part of a person of unsound mind to comply with the orders of the Court. What the appropriate remedy may be in the present case I do not take upon myself on this occasion to say; but I am not persuaded that the granting of the order will be altogether ineffectual—in fact, as it has been stated to me by counsel for the Defendant, the application has already led to this useful result, that the Defendant is now placed under proper restraint.

It seems to me, therefore, that the interim order was properly made, and it may properly be continued until judgment in the action, or further order.

Solicitors: *C. W. Inman; Piesse & Son.*

(1) 2 K. & J. 454.

G. A. S.

KEKEWICH, J.

1894

April 6; *May* 25.

In re COGHLAN. BROUGHTON *v.* BROUGHTON.

[1892 C. 4764.]

Marriage Settlement—Husband and Wife—After-acquired Property—Covenant to settle Property from any Source—Determination of Coverture—Property acquired after — Supplying words "during Coverture" — Ambiguity — Recitals.

By a marriage settlement, after reciting an agreement that the husband and wife should covenant in manner thereinafter mentioned as to any personal property which "during their joint lives" should be given or bequeathed to the wife or the husband in her right, the husband and wife jointly and severally covenanted with the trustees that, "if at any time after the marriage and during the life" of the wife any personal estate should be given or bequeathed or come to her or the husband in her right, the husband and wife would settle the same. And the husband also covenanted for the settlement of any personal estate that should "at any time thereafter" come to him.

The wife survived the husband, and after his death became entitled to a fund in Court as next of kin of an intestate:—

Held, that the wife's covenant was to be read as operative during coverture only, and that this construction was assisted by the recital, which might be referred to in order to explain the ambiguity in the covenant.

By the ante-nuptial settlement, dated the 15th of May, 1839, of *Fanny Maria Hardress Lawson* (then *Broughton*) and her husband *Stephen Lawson*, after reciting that the lady was possessed of two sums of Reduced Annuities and Consols and of certain other property thereinafter mentioned, and that it was agreed in contemplation of the marriage that the fortune and property of the lady should be transferred, as to the Reduced Annuities and Consols immediately, and, as to the said other property, on the death of her father, *Thomas Delves Broughton*, to the two trustees therein named upon the trusts thereinafter declared: and also reciting the transfer of the Reduced Annuities and Consols into the names of the trustees: It was witnessed and declared that the trustees should stand possessed of the Reduced Annuities and Consols, from and after the marriage, upon trust for the wife for her life for her separate use, and after her death for such

of the children or remoter issue of the marriage as she should by deed or will appoint, and, in default of appointment, for the children of the marriage equally at twenty-one or marriage. And after reciting that under the marriage settlement of the said *Thomas Delves Broughton* and his wife, the father and mother of Mrs. *Lawson*, she or the said *Stephen Lawson* in her right, would, on the death of the said *T. D. Broughton*, be entitled (subject to the power of appointment given to him by such settlement) to a part or share of certain trust funds, and that "it hath been agreed that the said *S. Lawson* and *F. M. H. Broughton* should covenant in manner hereinafter mentioned as to such parts or shares, and also as to any other moneys and personal property which, during the joint lives of the said *S. Lawson* and *F. M. H. Broughton*, should be given or bequeathed to her or the said *S. Lawson* in her right": It was witnessed, "and the said *S. Lawson* and *F. M. H. Broughton* do hereby jointly for themselves, their heirs, executors, and administrators, and each of them doth hereby severally for himself and herself, his and her heirs, executors, and administrators, covenant, promise and agree with and to the said" trustees, "and the survivor of them, and other the trustees or trustee for the time being appointed or to be appointed by or under these presents, that if at any time after the solemnization of the said intended marriage, and during the life of the said *F. M. H. Broughton*, any moneys or other personal estate shall be given or bequeathed or come to or devolve upon the said *F. M. H. Broughton*, or the said *S. Lawson* in her right, either under or by virtue of the said indenture of settlement, or otherwise howsoever, then, and so often as the same shall happen, the said *F. M. H. Broughton* and *S. Lawson* respectively, and their respective executors and administrators, shall and will, at the expense of the said *F. M. H. Broughton*, her executors or administrators," do or execute all such acts and deeds as the trustees should think proper for effectually vesting such moneys or other personal estate in the trustees, "in trust for the separate use of the said *F. M. H. Broughton* during the joint lives of her and the said *S. Lawson*, without being subject to the debts or interference of the said *S. Lawson*, and, after the decease of either of them, in trust for the survivor, and, after the

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decease of the survivor," upon the same trusts as were thereinbefore declared concerning the said trust funds firstly thereinbefore mentioned, and which were to take effect after the decease of the said *F. M. H. Broughton*. Then followed a covenant by the said *S. Lawson* alone that, "if at any time hereafter any moneys or other personal estate shall be given or bequeathed or come to or devolve upon him," then the same should be settled upon certain trusts for the benefit of the children of the marriage.

Mr. and Mrs. *Lawson* had four children, all of whom attained twenty-one or married, and also grandchildren.

Mr. *Lawson* died on the 4th of May, 1850, leaving his wife surviving him.

Henry Thomas Coghlan, a cousin of Mrs. *Lawson*, died on the 24th of November, 1892, intestate, and his estate was now being administered in this action.

By his certificate, dated the 30th of November, 1893, the Chief Clerk found that *H. T. Coghlan's* next of kin consisted of four persons, of whom Mrs. *Lawson*—who was a Defendant to the action—was one; and under an order made in the action on the 26th of February, 1894, certain funds to a large amount, representing Mrs. *Lawson's* one-fourth of part of his personal estate, were carried to a separate account intituled, "The account of the Defendant *F. M. H. Lawson*, widow, or the trustees of her marriage settlement."

This was a summons by the Defendant Mrs. *Lawson* for payment out to her of those funds.

By a deed-poll executed by Mrs. *Lawson* shortly after the summons had been taken out, she exercised the power in her marriage settlement by appointing her share of the personal estate of *H. T. Coghlan* (but only conditionally, in the event of its being held on the summons that the share was bound by the covenant in the settlement), as to one moiety, to her eldest daughter, who had married Colonel *William Edward Delves Broughton*, absolutely, for her separate use, and as to the other moiety to the children of such daughter equally.

Thereupon the summons, which had been served only upon the trustees of Mrs. *Lawson's* settlement, was, by his Lordship's

order, amended by adding Mrs. *Delves Broughton* and her children, all of whom were infants, as Respondents.

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Renshaw, Q.C., and *Creed*, for Mrs. *Lawson*, in support of the summons:—

The fund in Court is not bound by the covenant in the settlement. The question is whether the covenant should be read literally, as sweeping in all property coming to the wife "during her life," or whether it should be limited to the period of coverture only. It is now, we submit, settled that a covenant in this form applies only to property to which the marital right attaches, and that it should therefore be read as if the words "during the coverture" had been inserted: *Carter* v. *Carter* (1); *Godsal* v. *Webb* (2); *Reid* v. *Kenrick* (3); *Dickinson* v. *Dillwyn* (4); *In re Edwards* (5); *In re Campbell's Policies* (6); *In re Michell's Trusts* (7). The object of such a covenant is to protect the wife and children against the husband: when the husband is dead the reason for the covenant is gone. If this covenant is to be read as extending over the whole life of the wife, the children of a second marriage would be excluded from participating in the property of their mother. Any ambiguity in the covenant may be explained by reference to the introductory recital: *In re De Ros' Trust* (8); *In re Michell's Trusts* (9). And the recital expressly states the agreement of the parties to be for the settlement of personal property which should come to the wife or the husband in her right "during their joint lives." Accordingly, those words should be read into the covenant.

Marten, Q.C., and *De Morgan*, for the trustees of the settlement:—

The covenant should be construed as it stands, and the fund in question must be taken to be covered by it. *Godsal* v. *Webb* is distinguishable. It is true the point was discussed, but there was no decision that "during the life" of the wife meant "during

(1) Law Rep. 8 Eq. 551.
(2) 2 Keen, 99, 120–1.
(3) 1 Jur. (N.S.) 897; 24 L. J. (Ch.) 503.
(4) Law Rep. 8 Eq. 546.
(5) Law Rep. 9 Ch. 97.
(6) 6 Ch. D. 686.
(7) 9 Ch. D. 5.
(8) 31 Ch. D. 81.
(9) 9 Ch. D. 5, 9.

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the joint lives" of herself and her husband, or "during coverture." The real decision was that specific performance of the covenant could not be enforced at the suit of volunteers, that is, of next of kin, who are not within the marriage consideration: *Paul* v. *Paul* (1). In *Reid* v. *Kenrick* (2), the wife was held not to be bound because the covenant was by her husband, and not by her. That case is therefore clearly distinguishable from this, where the covenant is both joint and several. In *Dickinson* v. *Dillwyn* (3), the words of the covenant were that the husband and wife would "concur and join" in settling, indicating that the property to be settled must be acquired during their joint lives. Here we have expressions shewing that the covenant was intended to have a more extended operation, so that the decision in *In re Edwards* (4) is not applicable. That the parties intended the covenant to be general and unlimited is shewn by the husband's covenant to settle all his own after-acquired property, which covenant is also unlimited, and should not be cut down: *Fisher* v. *Shirley* (5). As to referring to recitals, that can only be done where there is an ambiguity in the operative part. In *In re De Ros' Trust* (6) there was an ambiguity; but here there is none: the covenant is precise in terms.

Warmington, Q.C., and *W. F. Hamilton*, for Mrs. *Delves Broughton* and her infant children:—

The object of the settlement, as indicated by the two covenants for settling after-acquired property, is to give the children of the marriage as much property as the parents can command: the children are the primary consideration. This is not an ordinary marriage settlement: it is intended to bind both parents at all hazards. *In re Edwards* is criticised by Sir *George Jessel* in *Holloway* v. *Holloway* (7).

KEKEWICH, J.:—

In construing this covenant, I consider myself bound by authority. The two cases before Vice-Chancellor *Malins*, *Dickinson*

(1) 15 Ch. D. 580.
(2) 1 Jur. (N.S.) 897; 24 L. J. (Ch.) 503.
(3) Law Rep. 8 Eq. 546.
(4) Law Rep. 9 Ch. 97.
(5) 43 Ch. D. 290.
(6) 31 Ch. D. 81.
(7) 25 W. R. 575.

v. *Dillwyn* (1) and *Carter* v. *Carter* (2), are as much in point as any cases can well be in a matter of this kind. If they had stood alone, it would have been my duty to examine them and see how far the Vice-Chancellor's reasoning applied to the case before me, and even how far it commended itself to my mind as sound and according to the more modern principles. But I must not do that. The very point has been before the Court of Appeal in *In re Edwards* (3), where Lord Justice *James* and Lord Justice *Mellish* approved of the two cases before Vice-Chancellor *Malins*. The Lords Justices thought it right to consult the Lord Chancellor (Lord *Selborne*) upon the point, and they had his concurrence "in the opinion that, in the absence of any expressions shewing that a covenant of this nature was intended to have a more extended operation, it is to be construed as if the usual words, 'during the said intended coverture,' had been inserted." The covenant there was that, in case after the marriage, the husband and wife, "or either of them in her right," should become entitled, and so on, without any limit touching the duration of the coverture, the duration of the joint lives, or the duration of either of them; and it was, of course, capable of argument that a covenant such as I have here, which is strictly limited to the life of the wife, is not a covenant of this nature. To my mind, that is hypercritical. A covenant of this nature means a covenant—as Chancery lawyers and conveyancers call it—for the settlement of after-acquired property of the wife. I cannot read the words as intended to mean a covenant which has no express reference to time if it does not mention coverture. I think it must, in the mouths of such men as those Judges who have used the expression, mean a covenant of that character—a covenant for settling the after-acquired property of the wife. It is said, in the absence of those words, the covenant is to have a more extended operation, and ought to be the same as if after-acquired property had been expressly mentioned. I do not think I can fine it down and say it is not a covenant of that nature for that purpose, and that there are words giving to it a more extended operation.

(1) Law Rep. 8 Eq. 546. (2) Law Rep. 8 Eq. 551.
(3) Law Rep. 9 Ch. 97, 100.

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Before turning to the covenant, I should mention also that both the cases before Vice-Chancellor *Malins* and the case before the Court of Appeal were considered by Mr. Justice *Stirling* in *Fisher* v. *Shirley* (1), where he not only quotes at length from the judgment of the Court of Appeal in *In re Edwards* (2), but states his reasons for distinguishing the case before him from that case; and the reason he gives for the conclusion at which the Lords Justices arrived is expressed in language which is deserving of attention. I am told that Sir *George Jessel*, in the case of *Holloway* v. *Holloway* (3), criticised *In re Edwards*; but it is impossible for me to say that it throws any obscurity on the decision of the Court of Appeal.

Here, no doubt, the covenant is of a peculiar character. It is a covenant that, "if at any time after the solemnization of the said intended marriage, and during the life of the said *F. M. H. Broughton*," and so on. Do those words shew, as against the general intention which at law is presumed, a more extended operation? It seems to me that it is perfectly legitimate, having regard to the way in which these instruments are intended to be construed, to read the covenant in this way: "That if at any time after the solemnization of the said intended marriage, but provided the wife be still alive." If you may read it in that way (this, of course, is only hypercritical for the purpose of testing it) you would, according to the cases, immediately read it also, "That if at any time during coverture provided the wife be still alive." I am aware that would introduce an absurd collocation of language, for there could not be continuous coverture if the wife were not alive; but I think it illustrates what was intended. The settlement is not drawn on the most perfect lines: it is not a highly finished conveyancing work; and it seems to me there has been a little multiplication of words in this covenant, and perhaps a little surplusage.

But whether that be so or not, the authorities, to my mind, bind me to hold that the words of this covenant are not sufficiently wide to extend its operation beyond the coverture.

Now, beyond the mere meaning of the words, as explained in the authorities to which I have referred—I have not referred to

(1) 43 Ch. D. 290. (2) Law Rep. 9 Ch. 97. (3) 25 W. R. 575.

other authorities, though they are not forgotten—I think there are two observations I ought to deal with. In the first place, my attention has been called particularly to the separate covenant by the husband, which is in a different form to the wife's, and certainly it is very peculiar. The covenant by the husband is, "That if at any time hereafter any moneys or other personal estate shall be given or bequeathed or come to or devolve upon him," then that shall be settled; and I am asked to draw some inference respecting the intention of the parties as regards the covenant by the wife, because the covenant by the husband is conceived in different language. It has been pointed out that the covenant of the husband might operate to bind property which did not fall within the covenant by the wife because it did not come to her during her life. That may or may not be the case, seeing that the covenant by the wife binds property coming to the husband in her right. That is a covenant as regards that property. But at any rate this is a peculiar covenant inserted for some reasons which I suppose entered into the minds of the contracting parties. It is quite right to look at it; but to say that, because the husband's covenant is in one form—a form that is peculiar—therefore the wife's covenant should be differently construed, appears to me to be a criticism which I do not think I ought to adopt.

Then there is another point which certainly must not be passed over. There is an introductory recital, and, if I am at liberty to look at that recital, it is of great value in construing this covenant. Up to this time I have construed the covenant independently of the recital. There are two recitals, or two branches of a recital. There is a recital that the wife, or the husband in her right, will, on the death of the father of the lady, be entitled (subject to the power of appointment given to him by his marriage settlement) to a part or share of and in certain trust funds: "and it hath been agreed that the said *S. Lawson* and *F. M. H. Broughton* should covenant in the manner hereinafter mentioned as to such parts or shares, and also as to any other moneys and personal property which, during the lives of the said *S. Lawson* and *F. M. H. Broughton*, should be given or bequeathed to her or the said *S. Lawson* in her right."

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I am not dwelling on the "giving or bequeathing" to her; nor, for the present purpose, do I wish to make anything of the fact that this property was not either given or bequeathed to her, but came to her as next of kin of a person dying intestate. But this is to be observed, that, according to this recital, it is personal property which, "during the joint lives" of the husband and wife, shall come to them. That is a contemplated time. May I look at that? If I may, certainly it indicates a strong intention on the part of the contracting parties that the property to be settled should only be property coming to the wife during the joint lives—that is, during the coverture.

It is said that the recital may only be looked at when there is ambiguity in the operative part, and that the case of *In re De Ros' Trust* (1), before Mr. Justice *Kay*, recognises that. There the learned Judge thought there was ambiguity in the operative part of the instrument, and he treated the rule as well settled. Why is there not an ambiguity here? I quite agree that if I am obliged or at liberty to read this covenant grammatically, there is no ambiguity at all. If I am at liberty to read this covenant according to its exact language, as the words are used in ordinary parlance—if I am at liberty to say that, when the covenant speaks of what shall come to the wife during her life, it means so long as she is alive—there is no ambiguity at all. But the authorities tell me that is by no means the case. Whether my construction of the covenant on the present occasion is right or wrong, the authorities, at any rate, go so far as to shew that these expressions are of a dubious character, and may mean one thing and may mean another. If the words are controlled by the context, they may mean only during the coverture, or possibly they may have a more extended character.

According to the legal authorities, this is not a plain use of language, about the meaning of which a lawyer reading the document can have no doubt. Directly you have got as far as that, and have found the ambiguity raised by the decisions, then also you have this power of referring to the recitals; and the recital here strongly assists the conclusion at which I have arrived.

(1) 31 Ch. D. 81.

Therefore, whether reading the covenant without the recital, or still more reading the covenant with the recital, I think that, as the law stands on the authorities, the covenant does not bind this particular property. If these authorities are to be reversed —and the matter is one of some importance—they must be reversed by higher authority than mine.

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Solicitor: *C. W. Stevens.*

G. I. F. C.

ROMER, J.
1894
April 24, 25; June 9.

PORTSEA ISLAND BUILDING SOCIETY *v.* BARCLAY.

[1892 P. 2059.]

Building Society—Power to Lend on First Mortgage—Part Payment of Mortgage Moneys by Third Person—Postponement of Security for Balance—Ultrà vires—Subrogation.

H.—a member of a building society which could only lend on first mortgages, but could release part of a mortgaged property if satisfied that the remainder would be a sufficient security—borrowed £17,000 from the society on a first mortgage.

The society, having exhausted its borrowing powers, applied for a loan from *B.*, who lent £6000 to *H.* on security of the property mortgaged to the society, which joined in the security to postpone their own mortgage. The £6000 was at once handed to the society by *H.*, who was credited with the amount in part discharge of the £17,000:—

Held, (1.) that the transaction with *B.* was *ultrà vires* the society; (2.) that *B.*'s security for £6000 was postponed to the society's security for £11,000; and (3.) that *B.* was not entitled to a security, as against the society, in respect of any part of the £6000 applied in payment of any debts and liabilities properly payable by the society.

THE *Second Portsea Island Benefit Building and Investment Society* was established in June, 1847, its rules being certified and enrolled under the Act 6 & 7 Will. 4, c. 32. On the 20th of September, 1876, the society was incorporated under the *Building Societies Act*, 1874 (37 & 38 Vict. c. 42); on the 14th of October, 1876, the registered name of the society was changed to the name of the *Portsea Island Building Society*; and on the 4th November, 1876, the existing rules of the society were altered, the alterations being duly certified and registered.

The rules, so altered, were, so far as they are material to this report, in the words or to the effect mentioned below:—

"1. Its object is to raise a fund by the subscriptions of its members for making advances to members out of the funds of the society upon security of freehold, copyhold, or leasehold property, by way of mortgage."

"4. Any person shall become a member by taking a share, or an aliquot part of a share, and paying the first monthly subscription in respect thereof. . . ."

"8. The directors shall have power from time to time to borrow from any person any sum (not exceeding two-thirds of the sum then due on mortgage to the society from its members) for the purpose of enabling the society to make advances to its members. . . . No person lending any sum of money under this rule shall be required to see to the application, or be liable to loss through the misapplication, thereof.

"9. The society will make advances of any sum to its members, repayable by monthly subscriptions of not less than 10*s.* per cent. on the amount advanced, on the first Tuesday of every month, with interest monthly at the rate of £5 per cent. per annum; not more than three-fourths of the value of the mortgaged property shall be advanced thereon. . . ." [This rule also provided that, on the directors being satisfied of the sufficiency of the security offered, and all other preliminaries being arranged, the money agreed to be advanced should be paid over to the member, "less the legal expenses."]

Rule 11 contained (*inter alia*) the following provisions:—

"In no case shall any property be deemed a sufficient security for monies to be advanced by this society which shall be subject to previous mortgage otherwise than to this society."

"The directors may from time to time accept any other security by mortgage, in manner hereinbefore mentioned, in place of any existing security, or may direct the release of any portion of any mortgaged estate if they shall be satisfied that the remainder will be sufficient security."

"All mortgage and other securities belonging to the society are to be kept in the strong-room in the offices of the society."

In 1873 *T. P. Wills*, the secretary, practically turned the society into a bank, which made advances (some only of which were secured) without reference to the rules. The borrowing was in excess of the two-thirds limit mentioned in rule 8. What was being done was concealed from the directors until 1878, when the depositors required payment of the money owing to them. The directors then communicated with the solicitors of the *Imperial Life Insurance Company* with a view to borrowing money from the company. The company were unwilling to

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advance the money required, because there was some doubt whether the society had not already exceeded its borrowing powers, and ultimately the money was obtained elsewhere; but the negotiations were relied on in the action mentioned below as shewing that the insurance company were then put on their guard as to the borrowing powers having been exceeded.

By an indenture, dated the 16th of February, 1883, *C. W. House* conveyed certain freehold hereditaments at *Gosport* to the society to secure an advance of £8250. Further advances by the society to *House* were secured by further charges on the same property, the aggregate amount advanced being over £17,000. In the action mentioned below it was agreed that the Court should deal with the case on the footing that the money was advanced to *House* as a member of the society in pursuance of its objects and rules. Towards the end of the year 1891 the directors of the society discovered that it had allowed enormous overdrafts, and also that it had largely exceeded its borrowing powers.

Application for an advance of money was again made by the directors of the society to the *Imperial Life Insurance Company*, and the following arrangement was made and carried out. *House* borrowed £6000 from the company, and by an indenture dated the 1st of December, 1891, and made between *C. W. House* of the first part, the society of the second part, *G. M. Beck* and *W. C. Redward* (who were the trustees of the society, and were thereinafter called "the trustees") of the third part, and *C. Barclay*, Sir *G. H. Chambers*, and *J. H. Hale* (who were thereinafter called "the mortgagees," and who were the trustees of the *Imperial Life Insurance Company*) of the fourth part—after reciting that *C. W. House* was seised in fee of the *Gosport* property, subject to the mortgages to the society, and that the mortgagees had agreed, "at the request as well of the society as of the said *C. W. House*, to lend to the said *C. W. House* the sum of £6000," upon having repayment thereof with interest secured in manner thereinafter appearing; and reciting that the society had, "at the request of the said *C. W. House*, agreed to postpone the society's mortgages to the security intended to be hereby effected in manner hereinafter appearing, and for the purpose of

releasing in favour of the mortgagor the estate (if any) of the trustees in the mortgaged hereditaments, the trustees have agreed to join in these presents in manner hereinafter appearing"—It was witnessed that in pursuance of the said agreement, and in consideration "of the sum of £6000, at the request of the society," paid to *C. W. House* by the mortgagees, *C. W. House* covenanted to pay the mortgagees £6000, with interest thereon at £6 per cent. per annum. And it was also witnessed that, in further pursuance of the said agreement and for the consideration aforesaid, the society as mortgagees, at the request of *C. W. House*, conveyed and released, and the trustees, by the direction of the society, conveyed and confirmed, and *C. W. House*, as beneficial owner, conveyed and confirmed, the *Gosport* property to the mortgagees discharged from all moneys due under the society's mortgages, but subject to a proviso that, if *C. W. House*, or the society should on the 1st of June then next pay the mortgagees £6000 and the interest thereon, the mortgagees would, at the request and cost of *C. W. House*, re-convey the mortgaged premises "to the use of the society, its successors and assigns, or as they should direct, subject to such right or equity of redemption as the same premises would, if these presents had not been executed, have been for the time being subject to under and by virtue of the society's mortgages on payment of the moneys thereby secured, and with the same power of sale and other powers and authorities, in all respects, as would have been subsisting or might have been exercised if these presents had not been executed."

The society at the same time deposited with *Barclay*, *Chambers*, and *Hale* the title-deeds which they held from *House*, and also other deeds, and executed a memorandum, also dated the 1st of December, 1891, declaring that such deeds had been deposited as a collateral security for the loan of £6000 that day made to *House* at the request of the society.

The trustees of the company, on the completion of the transaction, gave *House* a cheque for £6000. He straightway handed the cheque to the society, which credited him with the amount in its books, thus reducing the amount owing by him on his mortgage to the society.

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House objected during the arrangement to pay £6 per cent. interest; and the society undertook to pay that, and to give him an indemnity in respect of it. The society also paid all the costs of the arrangement out of their own funds.

William Lowe and *Robert Lowe* had also mortgaged properties belonging to them to the society; and on the 12th of December, 1891, a similar arrangement with respect to their properties was made between these mortgagors, the society, and *Barclay*, *Chambers*, and *Hale*.

On the 9th of January, 1892, the society passed resolutions in favour of its being wound up voluntarily, and appointing *William Edmunds* liquidator thereof; and on the 21st of January, 1892, an order was made by the County Court of *Hampshire*, holden at *Portsmouth*, continuing the winding-up under the supervision of that Court, and appointing *W. F. J. Hunt* as additional liquidator.

The society and its liquidators commenced an action against *Barclay*, *Chambers*, *Hale*, *House*, *W. Lowe*, and *R. Lowe*, claiming to have it declared that the mortgages to *Barclay*, *Chambers*, and *Hale*, and the memorandum of deposit, were *ultrà vires* the society and void, and should be set aside and cancelled, and, alternatively, that the society were first mortgagees and were not postponed to the mortgage in each case given to *Barclay*, *Chambers*, and *Hale*. The Plaintiffs claimed to have the documents referred to in the memorandum of deposit delivered up, and an injunction to restrain *Barclay*, *Chambers*, and *Hale* from parting with the same to any one except the Plaintiffs.

Barclay, *Chambers*, and *Hale* by their defence alleged that the mortgages to them were valid. They also delivered a counterclaim, in which they alleged (*a*) that the sums lent by them to *House* and to *W.* and *R. Lowe* were advanced at the request of the society to enable the borrowers, as required by the society, to reduce the amounts of their existing mortgages; (*b*) that the society had power to accept money in reduction of mortgage debts due to them, and as part of such transaction to postpone their own securities in favour of the persons finding the money, but that in any event these Defendants' securities ought to be treated as transfers of portions of the society's mortgages to the extent of the sums lent by these Defendants, ranking *pari passu* with the

residues of the mortgage debts due to the society; (*c*) that these Defendants lent the money on the faith of representations of the society that the same would rank as sums secured by first mortgage, and that the creation of or concurrence in these Defendants' securities was *intrà vires* the society; (*d*) that these Defendants had acted *bonâ fide* and without notice of any irregularity; (*e*) that the sums lent by these Defendants had been paid by *House* and *W.* and *R. Lowe* to the society, and had been expended by the society "in discharge of proper debts and liabilities of the society," which had "had the full benefit of such expenditure," and that in any case these Defendants were "entitled to stand in the place of the creditors and depositors of the Plaintiff society who were paid out of the said moneys." These Defendants by their counter-claim accordingly claimed—(1.) a declaration that the mortgages and deposit given to them were valid first mortgages for the whole of the amounts advanced by them; (2.) to have such securities enforced by foreclosure or sale; (3.) alternatively, to have it declared that these securities were valid transfers and ranked *pari passu* as above stated; (4.) realization of their securities on the footing of the last-mentioned declaration; (5.) personal payment by *House* and *W.* and *R. Lowe* of the sums advanced to them in December, 1891; (6.) alternatively, a declaration that these Defendants were entitled to stand in the place of the society's creditors and depositors who had been paid out of such sums; (7.) to (10.) inquiries and incidental relief.

The Defendant *House*, by his defence, in substance declined to admit anything alleged in the statement of claim or the counter-claim.

After issue had been joined in the action the *Portsea Island Building Society* (*Arbitration*) *Act*, 1893, was passed. This Act provided (sects. 3 and 4) for the transfer of all proceedings in the winding-up to an arbitrator to be appointed by the Lord Chancellor, and (sect. 12) for the stay of all actions and proceedings pending in respect of any matters within the arbitrator's jurisdiction, except certain proceedings therein referred to and the above-mentioned action; and it was enacted that the Plaintiffs and Defendants in such action were to accept the judgment of the Chancery Division of the High Court or of the Court of

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Appeal as final, though *Barclay*, *Chambers*, and *Hale* were to have certain rights of proving in the winding-up in case, as a result of the action, they should be deprived of the benefits of their securities.

The action was tried before Mr. Justice *Romer* on the 24th and 25th of April, 1894. Neither *R. Lowe* nor *W. Lowe* appeared personally or by counsel at the trial.

Haldane, Q.C., *Carson*, Q.C. (1), and *Edward Ford*, for the Plaintiffs :—

The trustees of the *Imperial Life Insurance Company* advanced their money with full knowledge that the society's borrowing powers were exhausted, and that the transaction was *ultrà vires* the society.

Even if the transaction was what it appeared to be, it was *ultrà vires*. It was really an investment on second mortgage of the balance of the amount originally lent by the society, which remained after deducting what the insurance company paid to *House*. Such an investment is forbidden by rule 11, and the effect of that prohibition is not cut down by the subsequent portion of the rule which enables the directors to accept another security or to release part of the mortgaged estate.

The insurance company obtained no security whatever by the society depositing deeds belonging to its members: *Moye* v. *Sparrow* (2).

[ROMER, J. :—The circumstances of that case were very special. Suppose the borrowing power was not exhausted ?]

Mortgages to the society by persons other than members might perhaps be so used; but not the mortgages of members. If there had been a rule enabling the deeds to be pledged, it would have been *ultrà vires*: *Murray* v. *Scott* (3).

[ROMER, J. :—The object of the transaction in the present case seems to have been to enable the borrower to discharge a portion of his debt to the society. The building society dealt with its

(1) Mr. *Carson* was made a Queen's Counsel after the conclusion of the arguments and before judgment was delivered.

(2) 18 W. R. 400, 402.

(3) 9 App. Cas. 519.

assets to bring about a borrowing by a member from another person. Was that a borrowing by the society? Has a building society power to deal with its assets so as to enable a third party to relieve a member from his liability to the society?]

Such a transaction is not one of the purposes for which a building society can be established: *Building Societies Act*, 1874, s. 13. The transaction was void in its inception: *Ashbury Railway Carriage and Iron Company* v. *Riche* (1).

[ROMER, J.:—Suppose the transaction is wrong in form, are the lenders to be left out in the cold? The society might have released part of the mortgaged property under rule 11.]

Yes; if they had retained a sufficient margin to cover their debt.

Cozens-Hardy, Q.C., and *A. W. Rowden*, for the Defendants *Barclay*, *Chambers*, and *Hale*:—

The transaction was not a borrowing by the society at all. There was nothing *ultrà vires* the society in such a transaction. They could have foreclosed, or could have assigned the whole or any part of the mortgage debt due to them, which was clearly their own property. *House* owed them over £17,000, and was not in a position to pay them even a part of that debt at once. It was plainly competent to the society to ask him to pay off the whole or part of it.

When they found he could not pay anything, there was nothing to prevent them from asking the insurance company to lend *House* the money to enable him to pay off part of what was due to the society. The society postponed their own security only to the extent of the sum which went in sovereigns into their own coffers. To say that the insurance company are not entitled to the money they lent is absurd—at any rate, the insurance company's trustees are assignees of the debt to the extent of £6000.

[ROMER, J.:—Suppose *House*, with money of his own and £6000 lent by the insurance company, had entirely paid off the society, and had given a first mortgage for the £6000, and had then

(1) Law Rep. 7 H. L. 653.

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asked the society to re-lend him £11,000 subject to the mortgage for £6000, would not the same result have been attained ?]

Such a mortgage to the society would not have been valid; but that would be a new transaction—not as this is, a partial realization of a valid security. What was done was not an evasion of the borrowing rule, but the only available mode of getting back part of the money lent by the society. The point is one of first impression.

[ROMER, J.:—It was not one of the objects of the society to finance other people.]

We admit that the memorandum of deposit was invalid. It would not have been a breach of trust for trustees to join in a mortgage like this as the best means for getting back their money; and if so, the directors could do the same thing.

What was done by the society was justified as being incidental to their position as mortgagees: *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood* (1); *Small* v. *Smith* (2).

If the insurance company are not entitled to rank as first mortgagees, their securities rank *pari passu* with the securities held by the society on the same properties.

At any rate, the insurance company are second creditors of the society to the extent to which the moneys advanced were applied in payment of the debts and liabilities of the society properly payable: *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society* (3).

Edward Clayton, for *House*:—

The money was lent to the society and not to *House*, and he is not liable in respect of it. If he is liable, his debt to the society is decreased to a corresponding amount.

Haldane, in reply.

1894. June 9. ROMER, J.:—

The facts of this case are not in dispute. The directors of the Plaintiff society (hereafter called the society), being in want of

(1) 44 Ch. D. 412. (2) 10 App. Cas. 119.
(3) 9 App. Cas. 857.

money, applied to the *Imperial Life Insurance Company* (hereafter called the *Imperial*) for a loan. It was found that the society's borrowing powers were exhausted, so that no loan could validly be made. Arrangements were then come to between the directors of the society, the *Imperial*, and certain persons to whom advances had been made by the society on the security of freehold or leasehold property. These arrangements and the attending circumstances were similar in each case, and I need only take one as an example. The Defendant *House* was indebted to the society in a sum considerably exceeding £6000. It has been agreed that I am to deal with this case on the footing that the money had been advanced to him as a member by the society in pursuance of the objects and rules of the society in that behalf. It was arranged that he should borrow £6000 of the *Imperial* on security of the property mortgaged to the society, and that the society should join in the security to release its charge in favour of the trustees of the *Imperial* so as to give the *Imperial* a first charge, and should further secure the *Imperial* by a deposit of the deeds and securities held from *House*. The £6000 was to be paid by *House*, when received by him, to the society, in part payment of the debt due to the society, leaving the balance of his debt to the society secured by a second charge on the property. This arrangement was carried out, and the directors of the society paid out of its funds all the costs thereby incurred.

The question is whether the deed dated the 1st of December, 1891, by which the society purported to postpone its security in favour of the *Imperial*, is binding on the society. It is admitted that the further security given by the society by deposit of deeds and memorandum of deposit dated the 1st of December, 1891, is not binding, and I need not further consider it. Now, in my opinion, the directors of the society were not authorized on its behalf to postpone its security as they purported to do by the deed of the 1st of December, 1891, and that deed is not binding on the society. It is, of course, clear that persons dealing with a building society are affected with notice of the limitation of the authority of its directors as established by its rules, and I, therefore, have to consider the rules in the present

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case. Now, it is provided by rule 11 that in no case shall any property be deemed a sufficient security for moneys to be advanced by the society which shall be subject to previous mortgage otherwise than to the society. It is further provided by that rule that the directors may from time to time accept any other security by mortgage in manner thereinbefore mentioned in place of any existing security (by which I understand any other security that is sufficient as before defined, which would not include a second mortgage). It is also provided by the rule that the directors may direct the release of any portion of any mortgaged estate if they shall be satisfied that the remainder will be sufficient security. Now, so far as these rules go, not only do they not expressly authorize such a transaction as I am considering, but they, at any rate *primâ facie*, negative its validity. By the transaction in question the directors have accepted for the balance of the debt due from *House* an insufficient and improper security under the rules—namely, a second charge. And there are certainly no other rules which could possibly be said to expressly authorize the transaction. It follows that, to enable the trustees of the *Imperial* to uphold the deed in question as against the society, they must (since there is no express rule) establish that the directors of the society had implied authority to execute the deed. But I cannot see any sufficient ground on which to imply such authority. It certainly is not within the general powers of the directors which I can imply from the nature of the society and its objects. It is not one of the objects of this society to finance a member or outsider, even though he be a debtor to the society, or to assist him in borrowing either by guaranteeing the loan to him or by giving security on the society's property for the loan; and the postponement by the society of a charge on the debtor's property is equivalent to giving security on the society's property. Nor can I say that the directors were authorized on the ground that they were only exercising the ordinary remedies of mortgagees, or only doing what was necessary to work out their legal rights or remedies as mortgagees. This transaction was not an ordinary remedy of a mortgagee or necessary to work out any legal right or remedy. It is suggested that it was a species of realization

of security by the mortgagee, and, as such, justified; but in no strict or true sense can this be said to be a realization of security, nor was it necessarily incidental to any realization of security or to the position of the directors as holders of security, and if the term "realization of security" be employed in an extended sense to cover any unusual transaction with the society's securities by which money is obtained, then it by no means follows that the directors are authorized to enter into such transaction. To entitle them to enter into any such unusual transaction the directors must shew either express authority under the rules, or what was called in the case of *Small* v. *Smith* (1) a potential necessity for their adopting that course. I have pointed out already that in this case there is no express authority under the rules, and certainly no case of potential necessity has been made or attempted to be made before me. On the contrary, the facts of the case negative the idea that the directors were driven to the course they adopted by any necessity for realizing or dealing with their security in that particular way, or by any necessity whatever apart from their general need to get money paid into their bank. So far as appears, they never contemplated or considered any course except the one they adopted, and that of borrowing, which could not legally be carried out. Under these circumstances, it appears to me that I am obliged to hold that the society is not bound by the deed. The result of this is to put the *Imperial* in the position of second mortgagees. But it is said on their behalf that I ought not to leave them in that position; that I ought to impose some terms on the society before giving it any relief or making any declaration in its favour in this action, so as to prevent or mitigate the effects of such a result. But I cannot see how I can impose terms on the society before making a declaration in its favour. If the deed is not binding on the society, I ought so to declare, and I have no right to refuse to make a declaration to that effect if the society will not consent to terms which will deprive it of some of the beneficial results of necessity flowing from the declaration. The *Imperial* have acted with full knowledge of the powers of the directors of the society, and must take the

(1) 10 App. Cas. 119.

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consequences of their action. I cannot restore the parties to their old positions. The transaction as between *House* and the *Imperial*, and the mortgage deed executed by *House* in favour of the *Imperial*, are still binding as between those parties, and I cannot cancel them, nor, indeed, am I asked by either of these parties to do so. Neither can I cancel the transaction as between *House* and the society, by which *House* has paid off and been discharged of part of his debt to the society. It is said that if the transaction had been one whereby the directors of the society had sold and transferred to the *Imperial* part of *House's* debt, that would have been within the powers of the directors, and that therefore I ought to treat the case before me as one in which that course had been adopted, and hold that the charge of the *Imperial* for £6000 ranks *pari passu* with the charge of the society for the balance of the debt now owing to the society. But I do not see how I can do that, even assuming that the directors could validly have sold and transferred to the *Imperial* a part of *House's* debt. Apart from the considerations above mentioned, which prevent me imposing terms on the society, I may point out that, as a matter of fact, the directors of the society never did sell or transfer, or, so far as I can see, consider whether they should sell and transfer, to the *Imperial* part of *House's* debt. That was not the transaction intended or carried out. If a transaction entered into on behalf of a building society is not binding on that society, what right has the Court to turn it into another transaction merely because that happens to be somewhat similar in its results and might have been validly entered into? Besides, the £6000 is not and cannot now be made part of the original debt due from *House* to the society. The rate of interest is different, and the incidents of the mortgage between *House* and the society differ in several other respects from those of the mortgage between *House* and the *Imperial*. Another suggestion of the *Imperial* was that I should direct the society to pay off the £6000 now due to the *Imperial* and take a transfer of the *Imperial's* debt and charge. But I have no right to order the society to do this or to compel it to invest its present funds in any such purchase. Lastly, it was suggested that in some way the *Imperial* were entitled to be admitted as creditors of the society for so much of

the £6000 which *House* paid to the society as was applied in paying off creditors and depositors of the society. I cannot follow this. The suggestion appears to me to be made under a confusion of ideas. The £6000 was not lent by the *Imperial* to the society. The £6000 received by the society from *House* was applied, as it was bound to be applied, in crediting *House* and discharging part of his debt, and I cannot undo that. The *Imperial* are creditors of *House* for the £6000 they lent, and not creditors of the society. The society cannot at the same time be obliged to credit *House* with this £6000 and be still liable for it or for part of it to the *Imperial*. The result is that, so far as concerns the transaction in which *House* was concerned, I must order the deeds and documents deposited to be handed over to the Plaintiff society and the memorandum of deposit of the 1st of December, 1891, to be cancelled, and I must declare that the deed of mortgage of the 1st of December, 1891, is not binding on the society, and that the society's charge is not postponed to, but takes priority over, that of the trustees of the *Imperial*. There will be similar orders and declarations in respect of the transactions in which the Defendants *William Lowe* and *Robert Lowe* were concerned. Then I must order the Defendants, the trustees of the *Imperial*, to pay the society's costs of the action.

Having regard to the defences of the Defendants *House* and the *Lowes*, and the other circumstances of the case, I make no order as to the costs of those Defendants of the action; but as regards the counter-claim of the trustees of the *Imperial*, I must dismiss that, as against the society, with costs. If the *Imperial* seek to redeem the society, they will be entitled to do so in the usual way. There will be personal judgment on the counter-claim of the *Imperial* on the personal covenants of the mortgagors, and *House* must also pay the costs of these counter-claims, as he put them to the proof of everything.

Solicitors for the Plaintiffs: *Learoyd, James, & Mellor.*

Solicitors for the *Imperial Insurance Company: Henry Kimber & Co.*

Solicitors for the Defendant *House: Chamberlayne & Short*, agents for *Hyde & Hobbs, Portsmouth.*

F. E.

C. A.
1894
June 7.

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[1886 D. 10.]

Solicitor—Remuneration—Conducting Sale—"Auctioneer's Commission"—Scale Charges—General Order under Solicitors' Remuneration Act, 1881, *r.* 4; *Sched. I., Part I., r.* 11.

Solicitors employed in a sale of property by auction conducted all the business connected with the sale, except taking the bids in the auction-room, for which the solicitors paid the auctioneer two guineas for each lot sold, and one guinea for each lot unsold. The solicitors claimed both the sum paid to the auctioneer and the scale fee for conducting the sale:—

Held (affirming the decision of the Vice-Chancellor of the County Palatine of *Lancaster*), that the payment to the auctioneer was a commission under rule 11 of Sched. I., Part I., of the General Order under the *Solicitors' Remuneration Act*, 1881, and that the solicitors were not entitled to charge for remuneration under the scale, but only for a *quantum meruit*.

In re Peace & Ellis (1) approved.

THIS was an appeal from a decision of Mr. *W. F. Robinson*, Q.C., the Vice-Chancellor of the County Palatine of *Lancaster*.

An order was made in the above-mentioned action on the 22nd of January, 1894, for the taxation of the costs of all parties to the action not already taxed as between solicitor and client, to be paid by the Defendant. Among the items in the Plaintiffs' bill of costs were the costs of the Plaintiffs' solicitors in conducting a sale of the property by auction in July, 1886. The solicitors claimed to be allowed a sum of £13 13*s.* paid to the auctioneer who took the biddings at the sale; and also the remuneration payable to them as solicitors conducting the sale under rule 11, Sched. I., Part I., of the General Order under the *Solicitors' Remuneration Act*, 1881, which were stated as follows:—

	£	*s.*	*d.*
To conducting sale by auction, including conditions of sale—viz., on Lots 2, 5, and 6, sold; aggregate purchase-money, £1070	10	10	0
Ditto, on Lots 1, 3, 4, 7, 8, 9, and 10, withdrawn; aggregate of reserve price, £16,205 . . .	22	13	9

The Registrar who taxed the costs allowed the payment to the auctioneers, but disallowed the two items of £10 10*s.* and

(1) 36 W. R. 61; W. N. (1887) 186.

£22 13*s.* 9*d.*, and the Plaintiffs objected to this disallowance. The reasons of the Registrar's disallowance as stated by him were as follows: "Although the auctioneers did nothing but receive the bids, and the solicitors did everything else in connection with the sale, and could not receive the bids owing to their not being licensed auctioneers, the payment of the sum of £13 13*s.* to the auctioneers for offering the properties was, having regard to the authorities, a commission within rule 11 of Sched. I., Part I., to the General Order under the *Solicitors' Remuneration Act,* 1881. The practice at *Liverpool* as regards sales by auction is, as stated in the Plaintiffs' objection, for the auctioneer simply to attend the sale and receive the bids, for which he is paid £2 2*s.* per lot sold, and £1 1*s.* per lot unsold, without regard to the amount of the purchase-money or the reserve price, the solicitors doing all the other work incident to the sale. This practice was observed in the present case, the solicitors having, as before stated, done all the work both before and after the sale in connection therewith, including the receipts of the deposits of the lots sold, according to the conditions of sale approved by me prior to the sale; the auctioneer simply taking the bids in the auction-room, for which he was paid the sums named, made up as stated. For the purpose of enabling me to fix the reserve prices, a valuer (who was not and had no connection with the person afterwards employed as auctioneer) was by my instructions directed by the solicitors having the conduct of the sale, and whose bill is now being taxed, to value the property and make an affidavit as to its value, which he did, and for which he was paid £38 17*s.*; but such valuer did no work whatever in connection with the sale, nor did he lot the property, as the properties offered for sale were separate and distinct and required no lotting."

The Plaintiffs moved before the Vice-Chancellor that the Registrar's certificate might be varied by allowing the items disallowed by him. The Vice-Chancellor dismissed the motion, on the ground that he could not decide against the decision of Mr. Justice *North* in *In re Peace & Ellis* (1); but said that without that decision he might have decided otherwise.

(1) 36 W. R. 61; W. N. (1887) 186.

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From this decision the Plaintiffs appealed.

Cozens-Hardy, Q.C., and *R. F. Norton*, for the Appellants:—

The question turns on the construction of the General Order under the *Solicitors' Remuneration Act*, 1881. By rule 4 of that order it is provided that "the remuneration prescribed by Sched. I. to this order is not to include stamps, counsels' fees, auctioneer's or valuer's charges, travelling or hotel expenses," and certain other things. Then, by Sched. I., Part I., under the title "Scale of Charges on Sales, Purchases, and Mortgages," a solicitor is entitled to charge as follows: "For conducting a sale of property by public auction, including the conditions of sale"—when the property is sold, a certain percentage on the price; when the property is not sold, a certain percentage on the reserved price. Then rule 11 of the same schedule provides as follows: "The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer." In the South of *England* the auctioneer usually conducts the sale, and is paid a percentage by the client by way of commission; and the solicitor only receives remuneration for the work done by him *quantum meruit*; but in the North of *England*, the solicitor usually takes all the trouble in conducting the sale, and the auctioneer receives a fixed charge for each lot sold or unsold. In that case the solicitor is, as we contend, entitled to remuneration on the scale charge under Sched. I. Rule 11 does not apply to such a case, for the payment to the auctioneer is not a "commission," but a "charge," which may be charged for extra, under rule 4 of the General Order: *In re Merchant Taylors' Company* (1); *Parker* v. *Blenkhorn* (2); *In re Macgowan* (3). *In re Wilson* (4), which is relied on by the other side, was decided on a different ground, namely, that the solicitor had not done the whole business.

T. R. Hughes, for the Defendant:—

The fee paid to the auctioneer was a commission within rule 11 of the schedule. Whatever is paid to an agent otherwise

(1) 30 Ch. D. 28.
(2) 14 App. Cas. 1.
(3) [1891] 1 Ch. 105.
(4) 29 Ch. D. 790.

than by salary is a commission, whether it is calculated by percentage or in any other way: *Burd* v. *Burd* (1). With respect to the expression "charges" in rule 4 of the General Order, there may be payments made to auctioneers unconnected with their duties as agents. At any rate, if the two rules are inconsistent, rule 11 of the schedule, which is specific, must prevail against the former rule, which is general. This is the view of the meaning of the rules which has been taken in *In re Sykes* (2); *In re Peace & Ellis* (3); and *In re Wilson* (4). The object of rule 11 is not to make any distinction between charge and commission, but to prevent any payments to the auctioneer being borne by the client. On any other construction a solicitor, according to the practice in the South of *England*, might claim to be paid under the scale, and so the client would have to pay the auctioneer's commission twice over.

Cozens-Hardy, in reply.

LINDLEY, L.J.:—

This case raises a question of very considerable difficulty and of no little importance. The point is this: whether a solicitor who has conducted a sale by auction, and who has paid an auctioneer, according to the custom which prevails in the North, a fee or a sum for taking the biddings, for the actual work done in the auction-room, is entitled to be paid by the scale or whether he is to be paid according to the pre-existing method of payment by what we call a *quantum meruit*. That he will get paid for his services is plain either way. We should not think of deciding that he is not to be paid at all. It is a question of which way he is to be paid. He wants to be paid by scale, which is more beneficial to him. But the Respondent says that is not right; that he ought to be paid by what he has done, not by scale. Now the difficulty arises in this way. Under the Order made in pursuance of the *Solicitors' Remuneration Act*, 1881, the 4th rule runs thus: "The remuneration prescribed by Sched. I. to this order" (I may describe that shortly as the

(1) 40 Ch. D. 628.
(2) 56 L. J. (Ch.) 238.
(3) 36 W. R. 61; W. N. (1887) 186.
(4) 29 Ch. D. 790.

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remuneration by scale) "is not to include stamps, counsels' fees, auctioneer's or valuer's charges, travelling or hotel expenses" and certain other things. Therefore it would appear that there may be according to this a scale fee, and also some auctioneer's charges which may be charged by the solicitors against the client. It is very difficult to construe rule 4 without coming to the conclusion that there may be some. Then we look at the remuneration prescribed by Sched. I., Part I., and we find this: "Scale of charges on sales . . . and rules applicable thereto. Scale. Vendor's solicitor." (That is what we have to deal with.) "For conducting a sale of property by public auction, including the conditions of sale." Then the percentage is set out. Now, stopping there, there is no difficulty in working that with rule 4; but then we come to the rules applicable to this scale, and we find in rule 11, "The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer." That gives rise to the difficulty at once. What is the difference between a commission within rule 11 and a charge within the 4th rule of the Order? I confess I do not see any. An auctioneer who is employed by a solicitor to sell is certainly employed as agent. He is not a principal; he is acting as an agent; and if you take the remuneration of the agent to be what is generally meant by the word "commission," everything you pay him for his services in the course of his agency comes within the expression of the word "commission," and I cannot see what the framers of this order, and of the scale, and of the rule were aiming at if they really intended to draw a distinction between a charge in rule 4 and "commission" in rule 11. If they did not intend to draw any distinction the two words will mean the same thing, and then you will have a general rule applicable to ordinary cases, and a specific regulation applying pointedly to a solicitor conducting a sale by auction. If the difficulty is reduced to that, the specific rule must prevail over the general. That was the view adopted by this Court in *In re Wilson* (1), and that has been the view which has prevailed ever since. The decision of Mr. Justice *North* in *In re Peace & Ellis* (2) is a distinct

(1) 29 Ch. D. 794. (2) 36 W. R. 61; W. N. (1887) 186.

decision upon the very point which is now submitted to us; and the question is whether he is wrong.

Now, I must say I cannot help thinking Mr. *Hughes*' observation is very weighty, that the real object of rule 11 is not to draw a distinction between charge and commission, but to draw a distinction between what is to fall upon the client and what is not, and that if any of the expenses incurred through an auctioneer are charged to the client the scale fee is not applicable, and the solicitor is to be paid upon the other method—a *quantum meruit* for the work which he actually does. I cannot help thinking that that is what those who drew up the rules were aiming at, and that it is a mistake to be led off into dwelling upon the contrast between the word "charge" and the word "commission." We must look at the substance of the thing, and if the client is to be charged with anything paid to an auctioneer, whether you call it charge, commission, or anything else, then the scale fee is not applicable, and the other method of remuneration is to be applied. We are told by the Taxing Master that this has been the view adopted ever since 1881, in the Taxing Office, and all over the country. I know that this is the first time that this has been brought effectually before the Court of Appeal for decision, and I quite agree there is a difficulty to which it is impossible to shut one's eyes arising out of the peculiar wording of rule 4; but there is no decision yet which in any way conflicts with the view which I think is the right one. The cases which I have referred to are clear authorities so far as they go in favour of that view. The case of *In re Macgowan* (1) is not at all opposed to it, because there the fee which was allowed in addition to the scale fee was something which did not come within the expression "negotiating a sale of property." That is to say, the client was not paying the solicitor a scale fee for negotiating a sale of property, and paying another fee for work which came within the description "negotiating a sale." He was paying a fee to a valuer who certified to the Court that the price arrived at by the negotiation was a fit and proper price for the Court to act upon. That is quite consistent with what we are now saying. Here the fee charged or sum payable to the

(1) [1891] 1 Ch. 105.

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auctioneer is clearly comprised in the remuneration for conducting the sale. Of course, one of the important parts of conducting a sale by auction is taking the bidding and conducting what goes on in the auction-room.

Although the case is not one without difficulty, I think we ought not to disturb the practice which has prevailed ever since 1881; and giving the order and rule the best consideration I can, I think the view which I have expressed is the correct one, and that the appeal must be dismissed with costs.

LOPES, L.J.:—

I am of the same opinion. It is extremely difficult to reconcile rule 4 of the General Order with rule 11 under Sched. I., Part I. The only way I can do it is the way which has been suggested by Lord Justice *Lindley*, and that is in holding that the word "commission" as used in rule 11 has not any technical meaning, but that it is to be read in a general way, and means that the scale for conducting a sale by auction shall apply only to cases where no payment in respect of the conducting of that sale is paid by the client to the auctioneer; and I am very much driven to that conclusion by an argument that was addressed to us by Mr. *Hughes*, because he said, and I think with reason, that if any other construction is put upon this section of the order and this rule, in effect the client would be paying twice over, because the remuneration of the scale, as I take it, was intended to include all expenses in respect of the conduct of the sale, and therefore would include that which is a part of the conducting of the sale, viz., the auctioneer's charges. If, on the other hand, that was to be a payment outside the remuneration scale, the client would be paying it in the remuneration scale, and again paying it in an independent payment. I cannot think that was intended. That view has been taken in this matter in the cases which have come before the Court for some years past, and I think we should not be right in departing from that.

DAVEY, L.J.:—

I am of the same opinion. If I could see my way to holding that commission to an auctioneer in rule 11 means only the com-

mission which is usually paid, I believe, in *London* and generally in the South of *England* to an auctioneer, and comprises not only his remuneration for actually taking the bids, but also for doing other work, such as preparing the particulars, advertising, getting posters printed, and matters of that kind, and that a fee paid to the auctioneer for merely taking the bids, which we are told is the practice in the North of *England*, is not a commission within rule 11, I would do so. In other words, if I could construe this as meaning that where the auctioneer does part of the work which may be done by a solicitor, and is included in conducting a sale by a solicitor, and the auctioneer receives a commission by way of remuneration for that work, in that case the scale fee was not to apply for the reason that part of the work for which the scale fee is given had not been done by the solicitor, and that it would apply where nothing more than a fee for taking the bids was paid, I think that that would be a reasonable rule, and very likely, for aught I know to the contrary, might express the intention of those who framed this rule. But on consideration I cannot see my way to hold that we can construe "commission" in that way. Commission is *primâ facie* the payment made to an agent for agency work, usually according to a scale—it may be an *ad valorem* scale, but not necessarily an *ad valorem* scale. It is in my opinion the most general word that can be used to describe the remuneration paid to an agent for an agency work other than a salary, and I cannot see how consistently with the ordinary use of language we can restrict the word "commission" in rule 11 so that it shall not apply to the fee payable to an auctioneer for taking the bidding at a fixed agreed rate of so much per lot. I think nobody could properly say that the auctioneer in such a case was not an agent, or that the sum per lot—two guineas if the lot is sold, or one guinea if it is not sold—was not a commission; and, that being so, I am of opinion that the fees which were paid in the present case to the auctioneer were a commission; and as that has been charged to the client in addition to the scale fee or the remuneration claimed by the solicitor, it appears to me that *primâ facie* the rule applies, and that the solicitor is not entitled to the scale fee, although according to the decision of the House of

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Lords he will be entitled to charge a *quantum meruit* for his services. And in coming to this conclusion I have been much struck by some of the observations which were addressed to us by the learned counsel for the Respondent. "If," he said, "the argument of Mr. *Cozens-Hardy* for the Appellant is correct, then in the South of *England*, where the auctioneer's commission comprises other things than taking the bidding, the client will pay only the scale fee, or, if he pays the auctioneer's commission, the solicitor will only have a *quantum meruit* for what he really does. But, on the other hand, in the North Country the solicitor will get his full scale fee, and the client will also have to pay the auctioneer's remuneration for taking the bids." I can see no escape from that. This is a rule made by skilled persons who were no doubt, and obviously must have been, acquainted with the practice both in *Liverpool* and in the North Country as well as in the South, and it must be a rule which is applicable to the practice in every part of the country; and the substance of the rule appears to me to be this —that the scale fee to the solicitor is intended to include all the expenses of conducting the sale, including the auctioneer's commission, understanding by the auctioneer's commission the remuneration which is paid to the auctioneer whether for merely taking the bids or for doing other work as well.

But then it is said that this is inconsistent with rule 4 of the Order. Now, no doubt there is a certain inconsistency, and I do not attempt to explain it. Wiser persons than I have attempted to do so, but have not altogether succeeded; but this one must say, that, according to the ordinary rule of construction, where there is a specific rule applicable to the particular case, then you must apply the specific rule notwithstanding that there is a general rule to which the specific rule seems to be contrary. If you cannot reconcile the two, then you must apply the specific rule. For myself, I think it is quite possible that rule 4 of the Order was drawn in its present form before the scale and the rules applicable to the scale were settled, and that by an oversight or *per incuriam* those words, "auctioneers' charges," were not struck out; but it may be at the same time, as Mr. *Hughes* pointed out, that rule 4 is applicable to every kind of transaction

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which is dealt with in the scale, and it is possible that there may be a case, although one cannot for the moment put it, in which auctioneers' charges not applicable to selling by auction might be charged in a mortgage transaction or some other business of that kind. At any rate, rule 4 is a general provision applicable to all kinds of transactions dealt with in the schedule, whereas rule 11 is a specific provision, and a specific provision which, according to the construction I have put upon it, is directly applicable to the present case. I do not think that we ought to refuse to apply rule 11 to the case to which it is directly applicable merely because there is some difficulty in reconciling it with rule 4 of the General Order.

Solicitors for all parties: *Burton, Yeates, & Hart,* agents for *Tyrer, Kenion, Tyrer, & Simpson, Liverpool.*

M. W.

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[1894 H. 543.]

HANFSTAENGL *v.* NEWNES.

[1894 H. 662.]

C. A. 1894 STIRLING, J. *March* 16; *April* 6. C. A. *May* 30, 31; *June* 11.

Copyright—Foreign Pictures—Infringement—Sketches from Tableaux Vivants representing the Pictures—Publication in Newspaper—Fine Arts Copyright Act, 1862 (25 *&* 26 *Vict. c.* 68), *ss.* 1, 2, 4, 6—*Foreign Law—Berne Convention—International Copyright Act,* 1886 (49 *&* 50 *Vict. c.* 33), *s.* 2, *sub-s.* 3—*Order in Council, November* 28, 1887.

The Plaintiff was the owner of the copyright in certain pictures first produced in *Germany.* These pictures had been represented on the stage of an English theatre in the form of *tableaux vivants,* but such representations had been held not to be infringements of the Plaintiff's copyright. The Defendants, who were the proprietors of an illustrated newspaper, published in their paper sketches of the *tableaux vivants,* with explanatory letterpress.

The German law was less favourable to the Plaintiff than English law:—

Held (reversing the judgment of *Stirling,* J.), that according to English law the sketches in the Defendants' newspaper were not copies or reproductions of the Plaintiff's picture within the meaning of sect. 1 of the

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Fine Arts Copyright Act, 1862, and that whether the case was considered as governed by German or English law the Plaintiff was not entitled to an injunction.

Dicks v. *Brooks* (1) followed.

Whether the owner of the copyright in a foreign picture can maintain an action for infringement without registering his copyright in *England*, *Quære.*

THE Plaintiff in these two actions was the owner of the copyright in certain pictures, which were originally painted in *Germany*, and he sought to restrain certain alleged infringements of such copyright, relying upon the rights conferred by the *Berne* Convention of the 9th of September, 1886, the *International Copyright Act*, 1886, and the Order in Council of the 28th of November, 1887, upon the authors of artistic works first published in a foreign country.

The Defendants in the first action were the *Empire Palace, Limited*, and the proprietors and publisher of the *Daily Graphic*, an illustrated newspaper. The Defendants in the second action were the proprietors and publisher of the *Westminster Budget*, also an illustrated newspaper. The case against the *Empire Palace, Limited*, was founded upon the reproduction of the Plaintiff's pictures upon the stage of the *Empire Theatre* in the form of "living pictures," but it was decided by the Court of Appeal (2) that such reproductions were not infringements of the Plaintiff's copyright.

Artists instructed by the respective managers of the two newspapers had visited the *Empire Theatre* and made sketches of the representations of the Plaintiff's pictures, and from these sketches drawings were made, of which reproductions by mechanical means appeared in the *Daily Graphic* of the 8th of February, 1894, and the *Westminster Budget* of the 16th of February, 1894, together with explanations of them in the letterpress, and also in placards of the latter publication. These were the infringements now complained of, and the Plaintiff moved in each action for an interim injunction to restrain such infringements, the two motions being heard together. It was contended on behalf of the Defendants that, having regard to the provisions of the *Berne* Convention, the *International Copyright Act*, 1886,

(1) 15 Ch. D. 22. (2) [1894] 2 Ch. 1.

s. 2, sub-s. 3, and the Order in Council of the 28th of November, 1887, clause 3, the Plaintiff's rights were governed by the German law; and the evidence of certain German advocates was adduced, the effect of which was that the reproduction of a work of art for public circulation without the consent of the owner of the copyright is forbidden, whether the reproduction be made directly from the original work or indirectly from it; but that the insertion of copies of works of art in literary works is not prohibited, provided the literary matter is the chief object, and the illustrations are only subsidiary to and for the purpose of explaining the text, and provided the author of the original work be indicated (1).

The motion came on for hearing before Mr. Justice *Stirling* on the 16th of March, 1894.

Hastings, Q.C., *Scrutton*, and *A. H. Jessel*, for the Plaintiff in both actions:—

According to English law, what the Defendants have done amounts to an infringement of the Plaintiff's copyright in the several pictures which they have reproduced in their newspapers. It is quite clear that the illustrations are "copies" or "colourable imitations" of the original pictures within the meaning of sect. 6

(1) The following sections of the *Copyright Acts* were specially commented on in the argument:—

25 & 26 Vict. c. 68, s. 1: "The author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing, and photograph which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this Act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproducing and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death. . . . ."

Sect. 2: "Nothing herein contained shall prejudice the right of any person to copy or use any work in which there shall be no copyright, or to represent any scene or object, notwithstanding that there may be copyright in some representation of such scene or object."

49 & 50 Vict. c. 33, s. 2, sub-s. 3: "The *International Copyright Acts* and an order made thereunder shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the foreign country in which such work was first produced."

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of the Act 25 & 26 Vict. c. 68; and when the subject of a picture is copied, it is immaterial whether that is done directly from the picture itself or through intervening copies: *Ex parte Beal* (1). But it is said the Plaintiff cannot succeed because the Defendants have taken their illustrations from representations on the stage, which it has been held are not in themselves infringements of the Plaintiff's copyright. That point is covered by *Turner* v. *Robinson* (2), and by a *dictum* of *Fry*, J., in *Lucas* v. *Cooke* (3). The same principle is applied in other branches of the law of copyright. For instance, a novel may be dramatized, under certain conditions, and acted upon the stage without infringing the copyright in the novel; but if the drama is printed and published, that constitutes an infringement: *Tinsley* v. *Lacy* (4); and the principle is also applied by *Kindersley*, V.-C., in *Murray* v. *Bogue* (5), to the case of a German translation of an English work, and a re-translation into English, which the Vice-Chancellor held would amount to a piracy of the English work, although the translation into German would not.

But, then, it is said that, according to German law, the Defendants are not precluded from doing what they have done. We submit, however, that the Plaintiff's rights are not affected by the German law at all. If the effect of the *International Copyright Act* is, as the Defendants contend, to import the German law into such cases as this, then that Act, instead of introducing uniformity, as it was intended to do, will have rendered necessary the investigation of a great number of foreign laws. One of the complaints under the Act of 1844 was that authors had to register in so many different countries, and the object of the Act was to produce uniformity. There is no trace in the *Berne* Convention of any intention to limit the rights conferred on foreign authors except as to the length of the term. It is said, however, that the Act of 1886, s. 2, sub-s. 3, goes much further than the Convention. That sub-section provides that "the *International Copyright Acts* and an order made thereunder shall not confer on any person any greater right or longer term of copyright in any work than that

(1) Law Rep. 3 Q. B. 387.
(2) 10 Ir. Ch. Rep. 121, 510.
(3) 13 Ch. D. 872, 879.
(4) 1 H. & M. 747.
(5) 1 Drew. 353, 368.

enjoyed in the foreign country in which such work was first produced."

We submit that the expressions "greater right" and "longer term" mean practically the same thing. The same words are repeated in the Order in Council, and if the Defendants' contention is right, then neither the Act nor the Order in Council will give effect to the Convention.

If, however, the German law is applicable, then, upon the evidence as to the effect of that law, we say that the Plaintiff is equally entitled to succeed.

Grosvenor Woods, Q.C., and *Bramwell Davis*, for *Newnes & Co.*; and *Grosvenor Woods*, Q.C., and *H. A. Forman*, for the proprietors of the *Daily Graphic*:—

We admit that in cases like *Turner* v. *Robinson* (1) if what the defendant does is done for the purpose of copying an original work, then any Court would hold that it was a fraud upon the Acts. But the Defendants' illustrations are not copies of the Plaintiff's pictures at all. The Defendants have merely reproduced in their newspapers sketches of certain public characters as they appeared upon the stage on certain occasions. The Defendants' newspapers profess to give in each issue the news of the day or the week, supplemented in some cases by illustrations of the scenes or events described in the letterpress. The illustrations complained of are simply representations of the persons engaged in the representation of the pictures in different costumes and attitudes, and are not in any sense reproductions of the Plaintiff's pictures as works of art. They do not amount to more than *bonâ fide* criticism of events of the day.

[STIRLING, J.:—Are they not reproductions of the design of the pictures?]

The case falls within sect. 2 of the Act of 1862, which saves the right of any person to copy or use any work in which there shall be no copyright, or to represent any scene or object, notwithstanding that there may be copyright in some representation of such scene or object. The Defendants have reproduced what

(1) 10 Ir. Ch. Rep. 121, 510.

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was exhibited on the stage, and that has been held not to be the subject of copyright. But supposing that the Defendants' illustrations had been copied from the original works, then we say that they are not published as works of art, and could not compete with the Plaintiff's pictures in respect of which he seeks protection: *Dicks* v. *Brooks* (1); *Scrutton* on Copyright (2). There is no case in which relief has been granted where the publication complained of was of such a nature that it could not compete with the sale of the original work.

In such a case as *Tinsley* v. *Lacy* (3) there might be competition; but here, from the nature of the case, the Defendants' illustrations cannot possibly produce any injury to the Plaintiff. In cases of literary copyright the question always is as to the quality and quantity of the work which is taken: *Scott* v. *Stanford* (4); *Trade Auxiliary Company* v. *Middlesborough and District Tradesmen's Protection Association* (5); *Schauer* v. *Field* (6). There is no case in which the publication of mere rough sketches in a newspaper has been held to so interfere with the sale of the works of art from which the sketches were taken as to justify the Court in giving relief upon interlocutory motion.

Then, as to the applicability of the German law. Whatever the *Berne* Convention may have provided, the question is, what is the law, having regard to the Act of 1886 and the Order in Council? The Order distinctly provides that the author of a literary or artistic work shall not have any greater right than that which he enjoys in the country in which the work is first produced; and the Act says the same. Apart from the statute it appears to be reasonable that the law should be to that effect, for why should we confer upon foreigners higher rights than they have in their own country? Upon the German law, the Plaintiff has not shewn that he has the right which he claims here.

Hastings, in reply:—

The true meaning of the Act and the Order in Council is not that the foreigner is not to have any greater right of copyright

(1) 15 Ch. D. 22.
(2) 2nd Ed. p. 173.
(3) 1 H. & M. 747.
(4) Law Rep. 3 Eq. 718.
(5) 40 Ch. D. 425, 429.
(6) [1893] 1 Ch. 35.

than he would have in his own country; but his right of protecting such copyright from invasion is not so limited. The distinction is between the copyright and the invasion of it.

The question of infringement must be governed by English law alone, and according to that the Plaintiff is clearly entitled to the relief he seeks. It is said that there is no intentional piracy, but that is immaterial: *West* v. *Francis* (1). Again, the Act says nothing about competition, and an injunction was granted in the case of the *London Stereoscopic and Photographic Company* v. *Kelly* (2), where there was no suggestion of competition. Moreover, the evidence shews that the Defendants' illustrations are in competition with the Plaintiff's pictures.

The Plaintiff is entitled to an injunction in each case: *Smith* v. *Chatto* (3).

1894. April 6. STIRLING, J. (after stating the facts, continued):—

A comparison of the illustrations which appear in the two papers with the photographs and other copies of the original pictures shews that although there are certain differences between them, the former so closely resemble the latter as to be in my judgment "copies," "reproductions," or "colourable imitations" of the latter. On the hearing of the motion three questions were argued: (1.) What are the rights of the Plaintiff on the supposition that those are governed exclusively by English law; (2.) Whether German law is to any and what extent applicable; and (3.) What are the rights of the Plaintiff supposing that German law does to any extent apply? As to the first of these questions, the rights of the Plaintiff are governed by the *Fine Arts Copyright Act*, 1862 (25 & 26 Vict. c. 68). Sect. 1 of that Act confers "the sole and exclusive right of copying, engraving, reproducing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size." Sect. 2 provides that "nothing herein contained shall prejudice the right of any person to copy or use any work in which there shall be no copyright, or to represent any scene or object, notwithstanding that there may

(1) 5 B. & Al. 737. (2) 5 Times L. R. 169.
(3) 31 L. T. (N.S.) 775.

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be copyright in some representation of such scene or object." Sect. 6 imposes certain penalties on any person who "shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution . . . any such work or the design thereof." The meaning of this Act has been considered by the Court of Queen's Bench in *Ex parte Beal* (1), a case relating to a summary proceeding for the recovery of penalties under the Act. The general principle is thus stated by Lord *Blackburn* (then Mr. Justice *Blackburn*):— "When the subject of a picture is copied, it is of no consequence whether that is done directly from the picture itself or through intervening copies; if in the result that which is copied be an imitation of the picture, then it is immaterial whether that be arrived at directly or by intermediate steps." Does it make any difference that one of these intermediate steps is one which does not fall within the exclusive right conferred by the Legislature on the owner of the copyright? In answering this question, assistance may be derived from considering the case of literary copyright. Suppose that at a public meeting some portion of a copyright work was recited or read from an authorized copy of the book; that would be no infringement of the rights of the owner of the copyright. If a journalist happened to be present, could he take down in shorthand what was said, and publish *verbatim* in his newspaper a substantial portion of the copyright work? I apprehend not. I speak of a substantial portion, because that is an element in dealing with questions of literary copyright. It is possible, for example, that in giving an account of the meeting, the reporter might introduce a few lines of the work. So, in the present case; if the artist employed by the newspaper had seen fit to make a sketch of the theatre as a whole, at the moment when one of these living pictures was being represented, it may be that the Court would not interfere, even although the sketch included as part of it a delineation of the *tableau*. That, however, is not the state of the facts with which I have to deal; in both these cases the illustrations represent the pictures only; in both papers they are described at the foot or the head as "Living Pictures at the *Empire*

(1) Law Rep. 3 Q. B. 387, 394.

Theatre." It was said, however, that the Defendants were unaware that the "living pictures" were imitations of actual pictures. In my judgment, however, it must be taken for the purposes of this motion that the Defendants in both cases were aware that actual pictures were being reproduced. The article in the *Daily Graphic* with reference to these very illustrations contains this passage:—"There may be no high art about producing a living facsimile of a picture in itself purporting to represent an incident, thus getting a *tableau* doubly second-hand," and the writer says in his affidavit:—"I did not know that the living pictures were copies of actual pictures, but I assumed that they were based on some pictures, and it was on this assumption that I wrote the paragraph." The artist of the *Westminster Budget* states that, after making his sketches, he asked the manager of the theatre whether he could give him any material which would assist him in completing his drawings, and that the manager subsequently lent him photographs of two of the representations. These photographs I understand to have been photographs of the pictures on which the representations were based. Under these circumstances I think that the illustrations in question must be treated as copies of the Plaintiff's pictures, and that they are not representations of scenes or objects within the meaning of sect. 2 of the Act 25 & 26 Vict. c. 68. It was much pressed upon me by the learned counsel for the Defendants, that these illustrations published by the Defendants in no way compete with the copies of the pictures authorized by the Plaintiff. If this contention be well founded, then the logical conclusion would seem to be that the owner of the copyright of a picture who had never permitted, and did not intend to permit, the picture to be copied, could not restrain any one from making a copy of it. This cannot have been the intention of the Legislature. The answer to that argument appears to me to be that the illustrations constitute a violation of the exclusive right conferred by the statute of 1862; that, in the language of *Kelly*, C.B., in *Bradbury* v. *Hotten* (1), the Defendants are thereby applying for their own use and for their own profit what otherwise the Plaintiff might have turned, and

(1) Law Rep. 8 Ex. 1, 6.

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possibly still may turn, to a profitable account. In my opinion, therefore, if these cases be governed exclusively by English law, the Plaintiff is entitled to an injunction in each.

It was said, however, in the second place, that the Plaintiff's rights are to some extent dependent on the law of *Germany*. This turns on the provisions of the *Berne* Convention, the *International Copyright Act* of 1886, and the Order in Council of the 28th of November, 1887. The *Berne* Convention is entitled "Convention for protecting effectively and in as uniform a manner as possible, the rights of authors over their literary and artistic works." In art. 2 of the Convention there is this provision: "Authors of any of the countries of the Union, or their lawful representatives, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may hereafter grant to natives. The enjoyment of these rights is subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and cannot exceed in the other countries the term of protection granted in the said country of origin. The country of origin of the work is that in which the work is first published, or if such publication takes place simultaneously in several countries of the Union, that one of them in which the shortest term of protection is accorded by law. For unpublished works the country to which the author belongs is considered the country of origin of the work." Then the *International Copyright Act* of 1886 was passed. It states in the Preamble: "Whereas by the *International Copyright Acts* Her Majesty is authorized by Order in Council to direct that as regards literary and artistic works first published in a foreign country the author shall have copyright therein during the period specified in the Order, not exceeding the period during which authors of the like works first published in the *United Kingdom* have copyright; and whereas at an international conference held at *Berne* in September, 1885, a draft of a convention was agreed to for giving to authors of literary and artistic works first published in one of the countries parties to the convention copyright in such works throughout the other countries parties to the convention; and whereas, without the authority of

Parliament, such convention cannot be carried into effect in Her Majesty's dominions and consequently Her Majesty cannot become a party thereto, and it is expedient to enable Her Majesty to accede to the convention." Sect. 2, sub-sect. 3, is as follows: "The *International Copyright Acts* and an Order made thereunder shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the foreign country in which such work was first produced." An Order in Council was made on the 28th of November, 1887, in pursuance of the Act, and by clause 1 it was ordered that "the convention as set out in the first schedule to this Order, shall, as from the commencement of this order, have full effect throughout Her Majesty's dominions, and all persons are enjoined to observe the same." Clause 3 provides, "the author of a literary or artistic work which, on or after the commencement of this Order, is first introduced in one of the foreign countries of the Copyright Union shall, subject as in this Order and in the *International Copyright Acts*, 1844 to 1886, mentioned, have as respects that work throughout Her Majesty's dominions, the same right of copyright, including any right capable of being conferred by an Order in Council under sect. 2 or sect. 5 of the *International Copyright Act*, 1844, or under any other enactment, as if the work had been first produced in the *United Kingdom*, and shall have such right during the same period; provided that the author of a literary or artistic work shall not have any greater right or longer term of copyright therein, than that which he enjoys in the country in which the work is first produced. The author of any literary or artistic work first produced before the commencement of this Order shall have the rights and remedies to which he is entitled under sect. 6 of the *International Copyright Act*, 1886." It is contended on behalf of the Defendants that, although in the convention nothing is said as to the extent of right, but duration of the right is alone referred to, the Act and Order do mention both extent and duration of right, and that the Plaintiff is not entitled to any greater right in this country than he enjoys in *Germany*. For the Plaintiff, it was urged that upon the construction of the Act and Order the words "any greater right" must be read as simply equivalent to "any longer term"; or, if this were not so,

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that the controversy related, not to the right, but to the invasion of it; and, consequently, that the Plaintiff's rights were not governed by German law. It is sufficient to say on this occasion that I am not satisfied of the validity of either of these contentions on behalf of the Plaintiff, and, consequently, I am bound to inquire what the German law is.

[His Lordship then proceeded to consider the evidence upon that subject, and came to the conclusion on the materials before him that, even according to German law, the Defendants failed; and he granted an injunction in each case to restrain the Defendants and their agents from printing, publishing, selling, or offering for sale, or otherwise disposing of, any copies or colourable imitations of the copyright pictures of the Plaintiff.]

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From this judgment the proprietors and publisher of the *Daily Graphic* appealed. The appeal was heard on the 30th and 31st of May, 1894.

Crackanthorpe, Q.C., *Grosvenor Woods*, Q.C., and *H. A. Forman*, for the Appellants:—

The Order in Council of the 28th of November, 1887, clause 3, cuts down the English copyright in a German work of art to the duration of the right in *Germany*: *Scrutton* on Copyright (1). By 49 & 50 Vict. c. 33, s. 2, sub-s. 3, no better right is given to the German here than he has in his own country, for the words, "no greater right," cannot, as has been contended, add nothing to the expression "longer term," and the Plaintiff has not in *Germany* the right which he claims here. The statute 25 & 26 Vict. c. 68, s. 1, first introduces copyright in designs. Sect. 1 gives to the proprietor the exclusive right of copying, &c., and multiplying "such painting or drawing and the design thereof." It is against principle to read "and" "or" in a statute restricting the liberty of the subject. What is intended to be protected is the right of reproducing the original work or a copy of the same character. Suppose one of these works was reproduced in clay, which the Court has held not to be an infringement,

(1) 2nd Ed. p. 255.

and then the modeller gave somebody leave to sketch the model, could the owner of the copyright complain of this? Sect. 2 reserves the right of everybody to copy or use any work in which there is no copyright. Now here there is no copyright in the *tableaux vivants*, nor in the case we have suggested in the design of the clay. The *tableaux vivants* are in the nature of original works of art, and anybody may copy them with the leave of the parties who exhibit them. We do not say that in no case of copying something in which there is no copyright can there be an infringement; but we say that where the ultimate copy is made from something of a nature entirely different from a picture, and in which there is no copyright, such copy is no infringement. *Dicks* v. *Brooks* (1) shews that what is to be looked at in these cases is not merely whether there is something which may be called a copy of the design, but whether it is such a copy as can interfere with the commercial value of the copyright. It was accordingly there held that a design in squares for worsted work was not a copy of an engraving within the meaning of the statute. It is impossible that these sketches should ever come into competition with the Plaintiff's pictures. The purport of the statutes must be looked to: *Bradbury* v. *Hotten* (2); see especially the remarks of *Kelly*, C.B. (3).

[LOPES, L.J.:—Suppose there had been no *tableaux vivants*, would these sketches have been infringements?]

We say No, because there would be no copy within the meaning of the Act. The Respondents in the Court below relied on *Ex parte Beal* (4) and *Turner* v. *Robinson* (5); but these cases do not bear on the question whether these are copies within the meaning of the Act. The substance of the thing is to be looked at: *Chatterton* v. *Cave* (6), and there is both sense and authority in support of the view that the copy must be such as could interfere with the commercial value of the copyright. [*Gambart* v. *Ball* (7) and *Smith* v. *Chatto* (8) were also referred to.] The German law does not prohibit what the Appellants

(1) 15 Ch. D. 22.
(2) Law Rep. 8 Ex. 1.
(3) Ibid. 5.
(4) Law Rep. 3 Q. B. 387.
(5) 10 Ir. Ch. Rep. 121, 510.
(6) 3 App. Cas. 483.
(7) 14 C. B. (N.S.) 306.
(8) 31 L. T. (N.S.) 775.

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have done; and if the matter is tried by English law, the designs are a mere accessory to the letterpress, which is no infringement. Whether the possessor of German copyright who seeks to enforce it here must register is a doubtful point, *Fishburn* v. *Hollingshead* (1) and *Hanfstaengl Art Publishing Company* v. *Holloway* (2) being in conflict.

Bramwell Davis, watched the case for the proprietors of the *Westminster Budget*, who did not appeal.

Hastings, Q.C., *Scrutton*, and *A. H. Jessel*, for the Plaintiff:—

It was distinctly decided in *Hanfstaengl Art Publishing Company* v. *Holloway* that registration of an English copyright in a foreign work of art under 25 & 26 Vict. c. 68, s. 4, is necessary before the owner can enforce his rights in *England*. In *Fishburn* v. *Hollingshead* the decision to the contrary effect was given on an interlocutory application, and the learned Judge reserved to himself liberty to reconsider the question at the trial of the action. Knowledge on the part of the person infringing that the act is an infringement is immaterial: *West* v. *Francis* (3). The statute in sect. 6 relating to criminal proceedings for penalties inserts the word "knowledge"; but it does not occur anywhere else in the Act. Nor does the fact that the Defendants' sketches were not taken direct from the picture, but from the *tableaux vivants*, make any difference in the infringement: *London Stereoscopic and Photographic Company* v. *Kelly* (4); *Dicks* v. *Brooks* (5); *Ex parte Beal* (6); *Cate* v. *Devon and Exeter Constitutional Newspaper Company* (7); *Tinsley* v. *Lacy* (8); *Murray* v. *Bogue* (9); *Turner* v. *Robinson* (10).

[LOPES, L.J., referred to *Roworth* v. *Wilkes* (11) and *Graves' Case* (12).]

The question of infringement is not affected by the fact that the Defendants' sketches have no commercial value, and that

(1) [1891] 2 Ch. 371.
(2) [1893] 2 Q. B. 1.
(3) 5 B. & Al. 737.
(4) 5 Times L. R. 169.
(5) 15 Ch. D. 22.
(6) Law Rep. 3 Q. B. 387.
(7) 40 Ch. D. 500.
(8) 1 H. & M. 747.
(9) 1 Drew. 353.
(10) 10 Ir. Ch. Rep. 121, 510.
(11) 1 Camp. 94.
(12) Law Rep. 4 Q. B. 715.

they will not come into competition with the Plaintiff's pictures. That consideration cannot affect the claim of the Plaintiff to protection of his legal right. With respect to the German law, we contend that the Order in Council does not refer to the nature of the rights of the owner of the copyright, but to the duration of them. The nature and extent of the right must be determined by the English law. But, assuming that the extent of the Plaintiff's rights must be determined by German law, the infringement is equally clear; for the Defendants' sketches are not mere illustrations of the letterpress, but are representations of the *tableaux vivants* and the letterpress is intended to draw attention to them. The sketches are the substance of the publication; and, therefore, would not be protected by German, any more than by English, law. The 2nd section of the 25 & 26 Vict. c. 68, has no application, for these sketches are, as we contend, copies of the original pictures in which there is copyright.

Crackanthorpe, in reply.

1894. June 11. LINDLEY, L.J.:—

The Plaintiff in this case is a foreign publisher. He claims to be entitled under the *International Copyright Act* to the copyright of certain pictures, and he complains that his copyright has been infringed by the reproduction of those pictures in the *Daily Graphic* newspaper without his consent. He accordingly applied for and obtained an injunction against the proprietors of the *Daily Graphic* restraining them from infringing his copyright. The proprietors have appealed from the order granting this injunction, and by consent this appeal is to be treated as if it were an appeal from a judgment on the trial of the action.

The Appellants contend, first, that, as the Plaintiff is not registered as the proprietor of the copyright in the pictures in question, he cannot maintain this action; secondly, that assuming him to be entitled to the copyright in the pictures, the extent of that right must be determined by the German law, and not by the English law; thirdly, that what the Defendants have done is not an infringement of the Plaintiff's copyright, even measured

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according to English law, and is still less an infringement of his copyright if measured according to German law, which, it is contended, confers upon him less extensive rights than the law of *England*.

The first point—viz., the necessity for registration—has been reserved for further argument, for it is known to be difficult; there are conflicting decisions upon it; and, as it will not arise if we decide that there has been no infringement, we thought it better to decide the question of infringement first. This, after all, is the great question between the parties, because, although this action would fail if registration were necessary, still, the Plaintiff could register his title, and then institute another action, and in that action raise the question of infringement, which both parties desire to have determined.

I shall assume, therefore, for the present that registration is unnecessary, and that the Plaintiff is entitled to copyright in this country under the *International Copyright Acts*, 1844 to 1886. The first question which then arises is, What is the right conferred by these Acts on the Plaintiff? And the second question is, Have the Defendants infringed that right?

I will address myself to each of these questions in turn. The right conferred by the *International Copyright Acts*, 1844 to 1886, upon the Plaintiff depends upon those Acts, and the Order in Council of the 28th of November, 1887, made under their provisions, and the *Berne* Convention of the 9th of September, 1886, referred to in that Order in Council. These documents are to be found in a convenient form in Mr. *Copinger's* and Mr. *Scrutton's* works on Copyright.

The short effect of these enactments, Order in Council, and Convention is that, subject to the limitation imposed by sect. 2, sub-sect. 3, of the *International Copyright Act*, 1886 (49 & 50 Vict. c. 33), the Plaintiff is entitled to the rights conferred on British subjects by 25 & 26 Vict. c. 68, which is the Act relating to copyright in paintings, drawings, and photographs. The right conferred by this Act is defined by sects. 1 and 2. [His Lordship read these sections.]

The short effect of these two sections, so far as paintings are concerned, is to give to the author of every original painting the

sole and exclusive right of copying or reproducing the same, and the design thereof, by any means, and of any size, for the period mentioned in the Act. But anything in which there is no copyright may be copied, although somebody else may have copied it before, and may have a copyright in his own copy. See *per* Lord *Blackburn* in *Graves' Case* (1). The limitation of this right, when claimed by foreigners under the *International Copyright Acts*, is expressed in sect. 2, sub-sect. 3, of the Act of 1886. [His Lordship read the clause.]

If, therefore, the German law of copyright confers upon the Plaintiff a less extensive right in his pictures than the right conferred on British authors by the Act to which I have already alluded, the extent of the Plaintiff's rights must be measured by the German standard, and not by the English standard, and must be restricted accordingly. Now, in one respect the German law of copyright is shewn by the evidence before us to be less extensive than the English, for by German law copyright in a painting does not extend to reproductions in literary works, provided such reproductions are explanatory only of some text. It cannot be said as a matter of law that English copyright does not extend to such a reproduction, although whether any particular illustration of a text would amount to an infringement of copyright in a particular painting would depend upon circumstances, as will appear presently. Again, there is evidence to shew that the German law confers no copyright in the design of a picture, as distinguished from the picture; but, on the other hand, there is evidence to shew that, even by German law, copyright in a picture extends to the idea conveyed by it. I confess that I do not feel sufficiently sure of the German law on this subject to be able to base my decision upon it; nor is it necessary for me to do so, as will appear presently.

Having now ascertained the rights of the Plaintiff, I proceed to consider whether they have been infringed by the proprietors of the *Daily Graphic*. In order to determine this question, it is necessary to know exactly what they have done. They (and by "they" I include their artist) have not seen or copied the Plaintiff's pictures, or any painting, engraving, drawing, or photograph

(1) Law Rep. 4 Q. B. 722.

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of them. What the Defendants have done is this. They have sent two persons to the *Empire Theatre* to describe and sketch what was being represented there. What was seen there was an arrangement of living persons, so dressed and placed as to represent what was represented in the Plaintiff's pictures. The idea of the representation at the *Empire Theatre* was, no doubt, suggested by and taken from the Plaintiff's pictures, and the representation was made as exact as could be with such materials as were procurable. But the representations at the *Empire Theatre* were not infringements of the Plaintiff's copyright in his paintings. This has been already decided. The sketches published in the *Daily Graphic* are rough sketches of those representations; but the sketches are so rough and incomplete that they do not represent any of the artistic merits of the Plaintiff's pictures. The sketches merely convey a rough idea of the subjects of the pictures, and of the grouping of their main features. To this extent, but not further or otherwise, it is possible to regard the sketches as copies of the Plaintiff's pictures, or as reproductions of the designs thereof. Such being the facts, the question arises whether the publication of the sketches thus made is an infringement of the Plaintiff's copyright. The learned Judge has held it to be so; but I am unable to agree with him.

I will pass over the difference between English and German law, to which I have alluded, with the remark that I am not satisfied that the sketches in the *Daily Graphic* are merely illustrations of the text. Their value to the reader does not depend on the text; and, if they were, without the text, infringements of the Plaintiff's copyright, their connection with the text is not close enough to render the German law, as distinguished from the English, applicable to the case. The *Daily Graphic* is an illustrated paper, and the sketches complained of are intended to let people know what is to be seen at the *Empire Theatre*, and have a value and importance wholly irrespective of the text which they are said to illustrate. They are principal objects, and not merely auxiliary or subordinate to the text by which it is sought to justify their insertion.

Treating the matter as turning on the English law of copyright, conferred by 25 & 26 Vict. c. 68, I am unable to hold

these sketches infringements of the Plaintiff's rights. The mere fact that the Defendants did not know that they were copying the Plaintiff's pictures would be immaterial if the sketches ought on other grounds to be regarded as infringements of the Plaintiff's rights: *West* v. *Francis* (1). Moreover, the Defendants did, in my opinion, know that the scenes they sketched represented pictures in which some one might have a copyright. I do not decide the case, therefore, on the absence of any intention to copy the Plaintiff's pictures, although the fact that the Defendants never intended to copy them cannot be wholly disregarded in such a case as the present.

Nor do I base my decision on sect. 2 of the statute 25 & 26 Vict. c. 68. The first portion of this section is not applicable, because the "work" there referred to is, I think, explained by the preamble to mean painting, drawing, or photograph, and, if the sketches complained of are copies of the Plaintiff's paintings, they are copies of paintings in which he has a copyright. Neither is the second part of sect. 2 applicable to the case, because, although these sketches are sketches of a scene or object, the scene or object is not such as is referred to in the section; the scene or object referred to in the section is something which some one else has copied, and not a scene or object which is itself a copy from a painting in which there is a copyright. Although, therefore, these sketches are made from something in which there is no copyright, and although they represent something which is not itself an infringement of the Plaintiff's copyright, yet I am not prepared to say, as a matter of law, that these sketches might not infringe the Plaintiff's rights, if they could be fairly regarded as reproductions of his pictures, or of the designs thereof. To hold otherwise would be to open the door to indirect piracies, which I am not at all disposed to do. A copy of a foreign copy of an English painting would not, I apprehend, be protected by sect. 2 (see *Murray* v. *Bogue* (2)), and the judgment of Lord *Blackburn* in *Ex parte Beal* (3) shews that if a painting is in fact reproduced it is immaterial what the intermediate steps may be by which the reproduction is

(1) 5 B. & Al. 737. (2) 1 Drew. 353.
(3) Law Rep. 3 Q. B. 394.

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arrived at. Again, the case of *Turner* v. *Robinson* (1), where the painting of the death of *Chatterton* was pirated by copying an arrangement made up from the picture, shews what injustice might be done if it were to be held that sect. 2 protected the Defendants, if they could otherwise be held to have infringed the Plaintiff's rights.

My decision is based on different and on wider grounds. Copyright, like patent right, is a monopoly restraining the public from doing that which, apart from the monopoly, it would be perfectly lawful for them to do. The monopoly is itself right and just, and is granted for the purpose of preventing persons from unfairly availing themselves of the work of others, whether that work be scientific, literary, or artistic. The protection of authors, whether of inventions, works of art, or of literary compositions, is the object to be attained by all patent and copyright laws. The Acts are to be construed with reference to this purpose. On the other hand, care must always be taken not to allow them to be made instruments of oppression and extortion. It is on such considerations as these that fair reviews of literary works, although containing lengthy extracts from them, are not infringements of the copyrights of them; that a representation of part of a dramatic piece, if confined to some comparatively insignificant part of it, is not an infringement of the copyright in such piece: *Chatterton* v. *Cave* (2). It was by considering the object of the statute, and not only its words, that in *Dicks* v. *Brooks* (3) a worsted work copy of an engraving was held not to be an infringement of the copyright therein. Lastly, in this very action, this Court, proceeding on the same principle, quite recently decided that the representation in the *Empire Theatre*, by human beings arranged as shewn in a picture, was not an infringement of the copyright in such picture (see *Hanfstaengl* v. *Empire Palace* (4)). Moreover, although the intention of an infringer is immaterial, if he copies more than is fair, so that his copy may be used as a substitute for the original, as in *Roworth* v. *Wilkes* (5), yet in doubtful cases the extent to which the

(1) 10 Ir. Ch. Rep. 121.
(2) 3 App. Cas. 483.
(3) 15 Ch. D. 22.
(4) [1894] 2 Ch. 1.
(5) 1 Camp. 94

copying has been carried and the object sought to be attained by the copies complained of are matters which must be considered, as is shewn by *Bradbury* v. *Hotten* (1) and *Scott* v. *Stanford* (2). The extent of copying and the degree of resemblance between the original and the copy are always most material, as was pointed out long ago in *West* v. *Francis* (3).

Guided by the foregoing considerations and by the principles acted upon in the decisions to which I have referred, I ask myself whether these sketches are such copies of the Plaintiff's pictures, or such reproductions of the designs thereof, as are struck at by the statute which confers copyright in such pictures. My answer to this question is, No. The sketches are not intended to be, and are not in fact, copies of the pictures at all, neither are they intended to be, nor are they in fact, reproductions of the designs of the pictures. They do not represent any of the beauties of the pictures. They are rough sketches, made for a very different purpose and answering a very different purpose, that purpose being, not to give an idea of the Plaintiff's pictures, but to give a rough idea of what is to be seen at the *Empire Theatre*. In giving that idea it is true that they also give a very rough idea of the subject represented in the Plaintiff's pictures. It is also true that in *West* v. *Francis* Mr. Justice *Bayley* said: "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original." But in applying this to any particular case the degree of resemblance is all important, and the possibility of injury to the Plaintiff must be regarded, as was pointed out in *Dicks* v. *Brooks* (4). It is only by a great stretch of language and by the exercise of much imagination that these sketches can be regarded as copies of the Plaintiff's pictures or the designs thereof. The case is very unlike *Gambart* v. *Ball* (5), where engravings were copied by photography. I cannot bring myself to say that the sketches complained of are, in any fair sense of the words, copies of the Plaintiff's pictures or reproductions of the designs thereof within the meaning of the statute to which I have referred. The question,

(1) Law Rep. 8 Ex. 1.
(2) Ibid. 3 Eq. 718.
(3) 5 B. & Al. 737, 743.
(4) 15 Ch. D. 22.
(5) 14 C. B. (N.S.) 306.

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if it came before a jury, would be one of fact for the decision of the jury, on a proper exposition by the Judge of the meaning of the statute, and I do not believe that any jury, properly directed, would find these sketches to be copies of the Plaintiff's pictures or reproductions of his designs. The Defendants have not, in fact, directly or indirectly, intentionally or unintentionally, made any use, certainly not any unfair use, of the Plaintiff's pictures or of the brains of their authors.

This, in my opinion, settles the case. In order to avoid misunderstanding, I will observe that I do not think that the competition test is necessarily conclusive. I agree that if the Defendants had copied the Plaintiff's pictures they would have infringed his rights, even although the use made by the Defendants of such copies could in no way compete with the sale of the Plaintiff's pictures. This was the case in *Hanfstaengl Art Publishing Company* v. *Holloway* (1), where copies of the Plaintiff's pictures were only used by being put on pill-boxes, but were nevertheless held to be infringements of his rights. Again, unauthorized sketches of pictures made on purpose to convey, and, in fact, conveying, tolerably correct ideas of them would, I apprehend, be infringements of the copyrights in them, although the sketches might not compete with the pictures or with any copies of them which their authors or their assigns might desire to make or sanction. But where copying a picture never enters the head of a person who is said to have copied it or to have reproduced its design, where the question is whether a sketch by such a person is or is not a copy or reproduction, then the impossibility of injury by competition may, I think, be fairly considered. The amusing sketches in *Punch* of the pictures in the *Royal Academy* are not, in my opinion, infringements of the copyrights in those pictures, although probably made from the pictures themselves. The application of similar principles to the different facts of this case leads me to a similar conclusion. In neither case is there any piracy, actual or intended.

In my opinion, therefore, the appeal must be allowed, and judgment must be entered for the Defendants with costs here and below.

(1) [1893] 2 Q. B. 1.

LOPES, L.J. :—

The substantial question in this case is whether the drawings in the *Daily Graphic* are piratical copies—piratical reproductions of the author's (*i.e.* the Plaintiff's) pictures or of the designs thereof within the meaning of the statute. This is a question of fact, and if decided in the negative determines this case.

I deal with this case as governed by the English law. It is most material in the first place to consider the object of the Act of Parliament (25 & 26 Vict c. 68) which first gave copyright in paintings, drawings, and photographs, and especially sects. 1 and 2 of that Act, upon the true interpretation of which this case depends. The object of the statute was to protect property, to protect the artistic faculty in painting, drawing, and photographing, and to prevent any interference by reproduction thereof with either the artist's reputation or the commercial value of his work: *Gambart* v. *Ball* (1); *Dicks* v. *Brooks* (2), per *Baggallay*, L.J. There must be no such reproduction either mediately or immediately. The artist is to be protected in respect of that which is his own meritorious work. A reproduction of his design or part thereof by any means and in any size is an infringement. But there must be such a reproduction as I have described. It is not every reproduction that amounts to an infringement. Thus, in *Dicks* v. *Brooks*, a *Berlin* woolwork pattern was held not to infringe the copyright in an engraving, and there are expressions in the judgment in that case with regard to what constitutes a copy which appear to be most appropriate to the case now under consideration, and which I shall presently refer to.

The short history of the drawings in the *Daily Graphic* is as follows. Artists instructed by the managers of the *Daily Graphic* visited the *Empire Theatre* and made sketches of the living representations of the Plaintiff's pictures, which were there to be seen in the shape of *tableaux vivants*, and from these sketches were made drawings of which reproductions by mechanical means appeared in the *Daily Graphic* of the 8th of February, 1894. These are the infringements complained of. It has been held that the living representations of the Plaintiff's pictures at the *Empire Theatre* are not infringements. That the

(1) 14 C. B. (N.S.) 306. (2) 15 Ch. D. 22, 36.

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drawings in question are not taken directly from the Plaintiff's pictures, but from living representations of them, is immaterial provided they are copies of the Plaintiff's pictures within the meaning of the statute. Nor is it necessary that there should be knowledge on the part of those charged with infringement that they were copying the Plaintiff's pictures. In this case admittedly they knew they were copying the pictures of some artist.

But are they copies within the meaning of the Act of Parliament? Are they piratical imitations of the Plaintiff's pictures—imitations of anything which was the artist's meritorious work? They may correctly be described as rough, rude drawings, devoid of any artistic merit; there is no attempt to reproduce the merits of the originals—no attempt at art, much less fine art; that which is attractive in the originals is absent, and they appear to me to have little more claim to be regarded as copies of the originals than the *Berlin* woolwork pattern had to be regarded as a copy of *Millais'* picture—*The Huguenots*—which was considered in *Dicks* v. *Brooks* (1). In that case, Lord Justice *James* said: "Nobody would ever take it to be the print, nobody would ever buy it instead of the print, . . . It is a work of a different class, intended for a different purpose, and, in my opinion, no more calculated to injure the print *quâ* print, or the reputation of the engraver, or the commercial value of the engraving in the hands of the proprietor, than if the same group were reproduced from the same engraving by waxwork at *Madame Tussaud's*, or in a plaster-of-*Paris* cast, or in a painting on porcelain. . . . Whether dealing with it as a matter of law, or dealing with it, as we must do, as a matter of fact, I am satisfied that the appellants' pattern is not a copy or piracy of any part of that which constituted the real merit and labour of the engraver of the defendant's print." Substituting the word picture for print and drawings for pattern, every word of this judgment appears to me applicable to the present case. No doubt there is a resemblance between the drawings and the Plaintiff's picture, but not that kind of resemblance struck at by the statute. *Bayley*, J., in *West* v. *Francis* (2), defined a copy to be "that which comes so near to the

(1) 15 Ch. D. 22, 35. (2) 5 B. & Al. 743.

original as to give to every person seeing it the idea created by the original." Can it be said that these drawings come so near to the originals as to give those seeing them the same idea as that which would be created by the originals?

Sect. 2 of the Act has no application to the present case. Holding as I do that these drawings are not infringements according to English law, it is unnecessary to say anything with regard to the German law, though I agree with what has been said by Lord Justice *Lindley*. In my judgment, these drawings in the *Daily Graphic* are not copies of the Plaintiff's pictures or reproductions of their design within the meaning of the statute, and, therefore, the appeal must be allowed.

DAVEY, L.J.:—

The principal question in this case is whether, in the language of the *Fine Arts Copyright Act*, 1862 (25 & 26 Vict. c. 68), the Defendants have infringed the Plaintiff's exclusive right of copying, reproducing, and multiplying certain pictures of the Plaintiff's, and the design thereof. It is unnecessary for me to repeat the statement of the facts of this case which has already been made. I will only observe that the fact that the sketches complained of were made from and were intended to describe the representations at the *Empire Theatre* would not prevent their being infringements of the Plaintiff's copyright if such sketches are reproductions or copies of the Plaintiff's pictures or the design thereof within the meaning of the Act.

Now, the first matter that one has to consider in these cases is, what was the object and intention of the statute? As was very well pointed out in the case of *Gambart* v. *Ball* (1) and in *Dicks* v. *Brooks* (2), the object of these Acts is both to protect the reputation of the artist from being lessened in the eyes of the world, and also to secure him the commercial value of his property—to encourage the arts by securing to the artist a monopoly in the sale of an object of attraction. The pictures of which these sketches are said to be a piratical copy or reproduction are works of art calculated to please the eye and the taste by a beautiful arrangement of form and colour, and to

(1) 14 C. B. (N.S.) 317. (2) 15 Ch. D. 22, 36.

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excite the emotions by the scenes depicted and thoughts suggested by the imagination or fancy of the artist. As objects of attraction they depend, not on the mere outline or configuration, but on the artistic feeling and power with which the subject is treated. The sketches before us are mere outlines, descriptive more or less accurately of the grouping and pose of the figures, and to a limited extent of the subject-matter of the pictures, but destitute of everything which makes the pictures works of art, and constitutes their claim to protection under the Act. What is a copy? I answer in the language of Mr. Justice *Bayley*, in *West* v. *Francis* (1): "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original." Of course there may be a coarse or clumsy copy; but in my opinion it is impossible to say that these woodcuts give the idea created by the originals—at any rate, with such fulness or completeness as to make them copies or reproductions. The point is not that these things are bad copies, but that they are not intended, and do not purport, to reproduce the value and essential qualities of the pictures as works of art, and are therefore not copies or reproductions at all within the meaning of the Act.

But it is said that the Act protects not only the picture, but the design. These words are probably inserted in order to bring within the protection of the Act a copy through a different medium, for instance, a black and white copy of a picture made by the engraver, the photographer, or the draftsman; but it must still be the design of the picture, and not a mere outline or descriptive sketch of it. The difference may at once be seen by comparing one of the photographs which have been shewn to us with the woodcut or sketch complained of, and would no doubt be more striking if the sketch were compared with the picture itself which is the subject of copyright.

I do not think that sect. 2 will assist the Defendants. I agree that "work" in that section means work of art, and I think that the first part of the section is directed to save the imitation or copies of works of art in which there is no copyright, and the second part is directed to the representation of scenes and objects

(1) 5 B. & Al. 737, 743.

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which may previously have been represented by others, so that a man shall not, for instance, by first painting a particular landscape or figure, acquire an exclusive right to the representation of that landscape or figure, although of course he may have copyright in his own representation of it.

I also agree that the German law, as I understand it, does not in the circumstances of this case restrict or narrow the Plaintiff's rights. I do not think that we could properly hold that these sketches were merely for the illustration of the written text. I think it would be more true to say that the text is accessory to and explanatory of the pictorial description of the performances at the *Empire Theatre*. But for the reasons I have given, I hold that these sketches are not copies or reproductions within the meaning of the Act.

Solicitor for the Plaintiff: *H. Bentwitch.*

Solicitor for the proprietors of the *Daily Graphic*: *L. Basil Thomas.*

Solicitors for the proprietors of the *Westminster Budget*: *Mellor, Smith, & Co.*

M. W.

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June 6, 18.

In re LUMLEY.
Ex parte HOOD BARRS.

[1892 L. 518.]

Married Woman—Separate Estate—Restraint on Anticipation—Sequestration—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1—*Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *ss.* 1, 2.

An order having been made for the payment of costs by a married woman who was tenant for life of real estate, for her separate use without power of anticipation:—

Held, that, under a sequestration to enforce payment of the costs, the sequestrators could not take rents which had accrued due after the date of the order for payment, even though the writ of sequestration was issued after those rents had become due.

Hood Barrs v. *Cathcart* (1) followed.

The 2nd section of the *Married Women's Property Act*, 1893, by which

(1) [1894] 2 Q. B. 559.

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the Court is empowered to enforce the payment of costs, payable by a married woman in proceedings instituted by herself, out of property subject to a restraint on anticipation, does not apply to an order for payment of costs made before the Act came into operation.

MARY CATHCART, the wife of *J. T. Cathcart*, was entitled under her marriage settlement to the income derived from certain freehold estates at *Wootton* in the county of *Stafford*, and *Stourbridge* in the county of *Worcester*, for her life for her separate use without power of anticipation. Mrs. *Cathcart* was indebted to Messrs. *Lumley*, her solicitors, in a considerable sum of money. Mr. *H. H. Hood Barrs* obtained an assignment from Messrs. *Lumley* of their claim, and instituted proceedings in respect of it against Mrs. *Cathcart*, in the course of which he obtained a writ of sequestration against her. On the 9th of June, 1893 Mrs. *Cathcart* moved to set aside this sequestration; but the motion was refused with costs, and her appeal against that order was also dismissed with costs on the 21st of June, 1893. She also made an unsuccessful attempt by summons on the 19th of October, 1893, to restrain the sequestrator from receiving the rents of her property, in which further costs were incurred. On each of those occasions an order was made against her for payment of costs, and on the two last-mentioned dates there was a direction that execution should be limited to her separate property not subject to any restraint on anticipation. The taxed costs altogether amounted to £115 1*s.* 2*d.*

In consequence of Mrs. *Cathcart's* failure to pay these costs, *Hood Barrs* obtained an order on the 15th of January, 1894, giving him leave to issue a writ of sequestration against her separate estate not subject to any restraint on anticipation, unless, by reason of sect. 19 of the *Married Women's Property Act*, 1882, the property should be liable to such sequestration notwithstanding such restriction (1). In pursuance of this order a writ of sequestration was issued by *Hood Barrs* on the 8th of February, 1894. Some of the rents which became due on the 25th of March, 1894, were paid by the tenants to Mr. *Lewis*, the agent of Mrs. *Cathcart*.

A motion was now made by *Hood Barrs*, in which he asked

(1) See *In re Lumley*, [1894] 2 Ch. 271.

for an injunction to restrain *Mary Cathcart*, her agents, &c., from receiving the rents due and payable on the 25th of March, 1894, and now in arrear, from the tenants of her estates situate at *Wootton* in the county of *Stafford*, and *Stourbridge* in the county of *Worcester*, or from levying any distress upon the said tenants, or any of them, for the said rents, until further order; and in the alternative, that he might be at liberty to issue a second writ of sequestration against the real and personal estate of Mrs. *Cathcart*, not subject to any restraint upon anticipation, for her non-compliance with the three orders mentioned above, or that a receiver might be appointed of the rents in arrear.

There was another motion by *Hood Barrs* and the sequestrators appointed by the writ of sequestration, asking that Mr. *Lewis* might be ordered to pay forthwith to the sequestrators the sum of £306 collected by him from the tenants of Mrs. *Cathcart* on the 26th, 27th, 28th, and 29th of March, 1894, notwithstanding the writ of sequestration. *Lewis* admitted that he had received on behalf of Mrs. *Cathcart* rents amounting to about £300, which accrued due on the 25th of March, 1894, and said that he had paid the amount which he had so received to her, less his commission.

The motions came on for hearing before Mr. Justice *North* on the 27th of April, 1894.

Swinfen Eady, Q.C., and *Ribton*, for the first motion :—

Rents in arrear are, so far as regards the restraint on anticipation, in the same position as if they had been actually received by a married woman who is entitled to them; they can no longer be "anticipated," and they can be taken under a sequestration against her to enforce a previous judgment or order for payment made against her. A married woman who is restrained from anticipation cannot by an antecedent disposition anticipate growing payments; but, so soon as they come into possession, her judgment creditor can take them: *In re Glanvill* (1); *Cox* v. *Bennett* (2). In the latter case it was said by Lord Justice *Lindley* (3): "If you can find at any time arrears that can be

(1) 31 Ch. D. 532. (2) [1891] 1 Ch. 617.
(3) [1891] 1 Ch. 623.

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attached, you may attach those arrears of the separate estate, although, of course, you cannot attach the future income which she is restrained from anticipating." That judgment is not restricted to income which is in arrear at the date of the order for payment. If there is income in arrear at the time when it is attempted to put the sequestration in force, it may be taken under it. On the 26th of March, Mrs. *Cathcart* could herself assign the income which accrued due on the previous day.

[They also referred to *In re Ann* (1).]

Mrs. *Cathcart*, in person, said that the costs were not really due from her.

[NORTH, J., said that, there being an order that she should pay the costs, she could not be heard to say that they were not due.]

Bartley Denniss, for the second motion :—

A writ of sequestration binds as from the date of its issue the personal property of the person against whom it is issued in the hands of his agent, and even in the hands of a purchaser with notice: *Daniell's* Chancery Practice (2).

The sequestration applies to any income which becomes in arrear after its date: *Married Women's Property Act*, 1882, s. 1; *Married Women's Property Act*, 1893, ss. 1, 2. A judgment is a contract of record.

[He referred also to *Hyde* v. *Hyde* (3).]

Oswald, Q.C., and *St. John Clerke*, for *Lewis*, were not called upon.

NORTH, J.:—

In my opinion, the sequestrators are not entitled to receive the rents which accrued due on the 25th of March. Orders having been made for the payment of costs by Mrs. *Cathcart* to Mr. *Hood Barrs*, and those orders not having been obeyed, an order was made on the 15th of January, 1894, giving liberty to him "to issue a writ of sequestration against the separate estate

(1) [1894] 1 Ch. 549. (2) 6th Ed. vol. i. p. 918.
(3) 13 P. D. 166.

of the said *Mary Cathcart* not subject to any restriction against anticipation, unless, by reason of sect. 19 of the *Married Women's Property Act*, 1882, the property shall be liable to sequestration notwithstanding such restriction." It is not suggested that these rents come within the latter part of sect. 19, and therefore the latter words may be left out of consideration. There is only power to issue the writ (and this is the limit to be found in the writ itself) "against the separate estate which is not subject to any restraint upon anticipation." The writ was issued, and at the date of its issue the only property of Mrs. *Cathcart* with which we are concerned was real estate, of which she is tenant for life. She is entitled to the income for her life only, subject to a restraint on anticipation. In my opinion, there was no power at that time under the order to issue sequestration against that property at all. The writ could not take effect against that property, because it was expressly excepted from the scope of the order, and necessarily also from the scope of the writ of sequestration which was issued under it.

On the 25th of March the rents became payable, and within two days from that date some rents were received, partly by Mrs. *Cathcart* and partly by her agent, Mr. *Lewis*. The sequestrators say that the rents so received ought to be handed over to them. Why? I cannot see any reason to justify the sequestrators in claiming them. As to these rents, Mrs. *Cathcart* was, at the date when the order for payment was made, restrained from anticipation, and property subject to such a restriction was expressly excepted from the operation of the order.

It is contended that, when the 25th of March arrived and the money was received by Mrs. *Cathcart* or her agent, it was in her hands no longer subject to any restriction against anticipation, and that an execution then issued against her would have entitled the person issuing it to take the money as part of her separate property not subject to any restraint on anticipation. I have no doubt that would be so; but it does not follow that the effect of a writ issued while the property was still subject to a restraint against anticipation would be the same. It is said that whether there is a judgment for costs or a contract the result is exactly the same. If this argument is sound with respect to a judgment,

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it must be equally sound with respect to a contract, and it would come to this, that a lady, who is restrained from anticipation, and who cannot contract herself out of the right to receive her income afterwards, might enter into a contract by which she would confer a right on some one else to take the money when the time for payment has come, although she is expressly prevented by law from entering into any such contract, because she is restrained from anticipation. The argument has been carried to this absurd extent, that the lady cannot be prevented from going to the Bank to receive her dividends on Consols on the morning of the day on which they become due, and that during all that day she may do as she likes, but that if on the following day (she not having received them on the first day) those dividends are in arrear they can be taken by the sequestrators. And a distinction has been drawn between rents or dividends which are due but are not in arrear, and rents and dividends which are overdue and in arrear. In my opinion there is no such distinction. When the books speak of the right to the income of a married woman which is said to be "in arrear," a distinction is being drawn between income which a married woman is not yet entitled to receive, and which she cannot anticipate; and income which she is entitled to receive. When the time has passed at which it first becomes due it is called "income in arrear," within the meaning of the phrase as used in the cases which have been cited.

The result is that these rents are income with respect to which Mrs. *Cathcart* was restrained from anticipation, and, in my opinion, she had no power before they became due to do anything which could fetter herself with respect to them after the period of payment had arrived. As Lord Justice *Cotton* said, in *Hyde* v. *Hyde* (1): "With regard to future income it would in my opinion be wrong to hold that the sequestrator can enforce payment of it to him, because when a married woman who has separate estate, which is the mere creature of a Court of Equity, is restrained from anticipation, the Court in fact secures the property to her, and as she cannot do any act to anticipate the income or to give it to another person by anticipation, it would in my

(1) 13 P. D. 173.

opinion be wrong for the Court to say, that because she has committed a contempt, the Court will not only authorize the sequestrator to receive the income already due to her, but will take advantage of her act to make an order for the sequestrator to receive the future income. That would be causing a married woman to do indirectly what she cannot do directly." In *In re Glanvill* (1) it was held that the date at which the income which it was sought to affect must be free from restraint on anticipation was the date of the issue of the writ in the action, and that nothing which became due after that date could be taken. In *Cox* v. *Bennett* (2) the Court took a different view, and held that it was sufficient if the income in question was in arrear and free from the restraint at the date when the order for payment was made. In the present case an attempt is made to go further, and to say that if the income which it is sought to attach is in arrear—not when the order for payment is made or when the writ of sequestration is issued—but when it is sought to put the writ into execution, that will be sufficient. In my opinion, it will not. There is no authority for so holding. The case which I have mentioned is against it in principle. In my opinion, therefore, the sequestrators had no power to receive the rents which accrued due on the 25th of March. Mrs. *Cathcart* was entitled to receive them or to employ an agent to do so, and the sequestrators cannot require them to pay over the moneys which they have received, because their claim extends only to the income which was not at the time when the order for payment was made subject to any restraint on anticipation.

[His Lordship added that the issue of a second sequestration would not add anything to the power of the sequestrators. The writ of sequestration was to work out the order for payment, and that order applied only to income which was in arrear at its date. He accordingly dismissed both the motions.]

W. L. C.

Mrs. *Cathcart* was also the Defendant in an action in the Queen's Bench Division—*Hood Barrs* v. *Cathcart* (3)—in which a similar writ of sequestration had been issued against her; and a

(1) 31 Ch. D. 532. (2) [1891] 1 Ch. 617.
(3) [1894] 2 Q. B. 559.

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receiver had been appointed of the rents of the property which accrued due on the 25th of March, 1894, and the appointment of the receiver was affirmed by the Divisional Court. Mrs. *Cathcart* appealed against this decision to the Court of Appeal, and her appeal was heard by the other branch of the Court of Appeal and the decision of the Divisional Court was reversed (1).

C. A.

Hood Barrs appealed against the decision of Mr. Justice *North* in the first motion in *In re Lumley*; and the appeal came on to be heard on the 6th of June, 1894.

Hopkinson, Q.C., and *Bartley Denniss*, for the Appellant:—

Rents in arrear are in the same position as if they had been actually received by a married woman who is entitled to them: they are no longer subject to restraint of anticipation, and such rents can be taken by the woman's judgment creditor, notwithstanding her restraint on anticipation: *In re Glanvill* (2); *Cox* v. *Bennett* (3); *Pike* v. *Fitzgibbon* (4). It makes no difference whether the property was in her possession when the order was made or subsequently came into her hands, provided it is not at the time subject to a restraint on anticipation: 45 & 46 Vict. c. 75, s. 1, sub-s. 4: *Hyde* v. *Hyde* (5); *Claydon* v. *Finch* (6).

[DAVEY, L.J., referred to *Chapman* v. *Biggs* (7); *Draycott* v. *Harrison* (8).]

In the present case the restraint on anticipation is no defence to the motion, because the costs payable by Mrs. *Cathcart* were incurred in proceedings instituted by herself; and it is enacted by the 2nd section of the *Married Women's Property Act*, 1893 (9),

(1) [1894] 2 Q. B. 559.
(2) 31 Ch. D. 532.
(3) [1891] 1 Ch. 617.
(4) 17 Ch. D. 454.
(5) 13 P. D. 166.
(6) Law Rep. 15 Eq. 266.
(7) 11 Q. B. D. 27.
(8) 17 Q. B. D. 147.
(9) 56 & 57 Vict. c. 63, s. 2: "In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

that in any action or proceeding instituted by a woman the Court before which such action or proceeding is pending shall have jurisdiction to make an order for payment of costs out of her separate estate which is subject to a restraint on anticipation. It is true that in this case the proceedings were originally commenced by Messrs. *Lumley*, and not by Mrs. *Cathcart*; but the motion and summons in which the costs were incurred were made and taken out by her. The section applies to proceedings commenced before the Act passed, namely, the 5th of December, 1893, provided such proceedings are still pending; and proceedings are still pending so long as the Court can make an order to enforce them, or any of the parties can make an application with respect to them: *Salt* v. *Cooper* (1); *In re Clagett's Estate* (2).

Mrs. *Cathcart*, who appeared in person, was not called on.

1894. June 18. DAVEY, L.J., delivered the judgment of the Court (*Lindley* and *Davey*, L.JJ.) as follows:—

This was an appeal against an order made by Mr. Justice *North* on the 28th of April, 1894, dismissing with costs a motion by Mr. *Hood Barrs* in this matter. It was heard by Lord Justice *Lindley* and myself. In this case Mr. *Hood Barrs* was Appellant and Mrs. *Cathcart* was Respondent. By orders made in the matter on the 9th of June, 1893, the 21st of June, 1893, and the 19th of October, 1893, Mrs. *Cathcart* has been ordered to pay to Mr. *Hood Barrs* costs which have been taxed, and amount altogether to £115 1*s.* 2*d.* The order of the 9th of June, 1893, was made on a motion by Mrs. *Cathcart*, and it was an order for payment of costs by Mrs. *Cathcart* simply, without more. The orders of the 21st of June and the 19th of October were also made on applications by motion and summons of Mrs. *Cathcart*, and each of these orders contains the direction that execution for such costs against Mrs. *Cathcart* be limited to her separate property not subject to any restraint against anticipation, unless by virtue of sect. 19 of the *Married Women's Property Act*, 1882, such property shall be liable to execution notwithstanding such restraint. By an order of the 15th of January, 1894, it was

(1) 16 Ch. D. 544. (2) 20 Ch. D. 637.

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ordered that Mr. *Hood Barrs* be at liberty to issue a writ of sequestration to recover the above three sums of costs against the separate estate of Mrs. *Cathcart*, restricted in the same terms as those which I have read from the last two orders. Mr. *Hood Barr's* motion was—(1.) to continue an injunction granted by the Vacation Judge on the 29th of March, 1894, to restrain Mrs. *Cathcart* from receiving the rents of her real estate due on the 25th of March, and then in arrear from her tenants; or (2.), in the alternative, that a second writ of sequestration might be issued; or, lastly, that a receiver might be appointed of the rents in arrear. The learned Judge has held that the rents in arrear could not be taken in execution under the existing writ of sequestration, and that Mr. *Hood Barrs* was not entitled to a fresh writ, or to a receiver, for the purpose of taking those arrears in execution on any of the three orders for costs above mentioned.

The general question involved in this case was dealt with in the judgments delivered by the other Division of this Court on the 16th of June in the case of *Hood Barrs* v. *Cathcart* (1), and it follows from that decision that the learned Judge took a correct view of the general question, and that his judgment on the main point ought to be affirmed in this case.

But the Appellant raised another point, founded on sect. 2 of the *Married Women's Property Act*, 1893 (56 & 57 Vict. c. 63). That section is as follows:—[His Lordship read the section.] It was said that these three orders are orders for payment of costs, and, inasmuch as they were made on applications by motion or summons by Mrs. *Cathcart* herself, they were made in a "proceeding instituted" by her, notwithstanding that the matter in which they were made was initiated by the petition of the present Appellant, or Messrs. *Lumley*. It is unnecessary to decide whether that contention was correct. Assuming it to be so, we are of opinion that the section does not give the Court jurisdiction to alter or vary an order for payment of costs made before the Act came into operation, or to make now a new order for payment of the same costs. We are, therefore, of opinion that the appeal should be dismissed with costs.

Solicitors: *Hood Barrs & Co.; H. R. Elton.*

(1) [1894] 2 Q. B. 559.

M. W.

In re CLERGY ORPHAN CORPORATION.

C. A. 1894 July 24, 26; Aug. 10.

Charity—Endowment—Consent of Charity Commissioners—Voluntary Subscriptions—Investment in Land—Charitable Trusts Act, 1853 (16 & 17 *Vict.* c. 137), *ss.* 62, 66—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict.* c. 18), *s.* 80—*Costs—Adverse Litigation.*

A charitable corporation, which was partly supported by voluntary subscriptions and partly by the income of endowments, invested a fund, derived from voluntary contributions towards the general purposes of the charity, in the purchase of land. They afterwards sold part of the land to a railway company. The Charity Commissioners claimed that the purchase-money should not be paid to the corporation without the consent of the commissioners:—

Held, on the construction of sects. 62 and 66 of the *Charitable Trusts Act*, 1853, (1.) that income of any endowment means *primâ facie* the income of any invested funds, whether such funds be held upon any special trust or for the general purposes of the charity; (2.) but that in the case of a charity partly maintained by voluntary subscriptions and partly by the income of any endowment, bequests and donations for the general purposes of the charity which may be lawfully applied as income consistently with the terms of the gift are exempt from the jurisdiction of the Charity Commissioners; and (3.) that such gifts and the income thereof are not brought within the jurisdiction of the commissioners by being invested by the governing body. The claim of the Charity Commissioners was accordingly rejected, and the fund in Court ordered to be paid to the corporation.

The decision of *Kekewich*, J., affirmed.

Governors of the Charity for the Relief of Poor Widows and Children of Clergymen v. *Sutton* (1) considered.

Held also, by *Kekewich*, J., that the claim of the Charity Commissioners was not adverse litigation within the meaning of sect. 80 of the *Lands Clauses Act*, 1845, and that the railway company must pay the costs of the application.

THIS was an appeal by the Charity Commissioners from a decision of Mr. Justice *Kekewich*.

A piece of land belonging to the *Clergy Orphan Corporation* and situated near *Lord's Cricket Ground*, in *St. John's Wood*, had been taken by the *Manchester, Sheffield, and Lincolnshire Railway Company* under the powers contained in their special Act of 1893. The purchase-money was fixed at £40,000, and a sum of

(1) 27 Beav. 651.

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£5000, part of the purchase-money, had been paid into Court under the *Lands Clauses Consolidation Act*.

The land in question was purchased by the corporation under the powers of their Act (49 Geo. 3, c. xviii.), which expressly empowered the corporation to purchase and hold land, but gave no power to sell or let the land so purchased. The land had been originally bought by the corporation with moneys produced by the sale of Consols, which were derived from voluntary subscriptions and donations available for the general purposes of the charity.

A petition was now presented by the corporation for payment of the sum of £5000 to them as being absolutely entitled thereto, but was opposed by the Charity Commissioners on the ground that the fund represented land which the corporation had no power to sell without the consent of the Commissioners.

The question mainly turned on the construction of the 62nd and 66th sections of the *Charitable Trusts Act*, 1853 (1).

(1) 16 & 17 Vict. c. 137, s. 62.

Sect. 62: "This Act shall not extend to the universities of *Oxford*, *Cambridge*, *London*, or *Durham*, or any college or hall in the said universities of *Oxford*, *Cambridge*, and *Durham*, or to any cathedral or collegiate church, or to any building registered as a place of meeting for religious worship with the Registrar-General of births, deaths, or marriages in *England* and *Wales*, and *bonâ fide* used as a place of meeting for religious worship; nor shall this Act, for the period of two years from the passing thereof, extend or be in any manner applied to charities or institutions, the funds or income of which are applicable exclusively for the benefit of persons of the Roman Catholic persuasion, and which are under the superintendence or control of persons of that persuasion; nor shall this Act extend or be applied to the Commissioners of Queen *Anne's* Bounty, or to the *British Museum*, or to any friendly or benefit society, or savings' bank, or any institution, establishment, or society for religious or other charitable purposes, or to the auxiliary or branch associations connected therewith, wholly maintained by voluntary contributions, or any book-selling or publishing business carried on by or under the direction of any society wholly or partially exempted from this Act, so far as such business is or shall be carried on by means of voluntary contributions only, or the capital or stock of such business; and where any charity is maintained partly by voluntary subscriptions and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation

Mr. Justice *Kekewich* held that the case was governed by the *Governors of the Charity for the Relief of Poor Widows and Children of Clergymen* v. *Sutton* (1), and that the land having been originally purchased and paid for out of funds voluntarily contributed for the general purposes of the charity, was not an endowment within the meaning of the *Charitable Trusts Act*, and directed the fund in Court to be paid out to the corporation.

His Lordship also held that the claim of the Commissioners was not adverse litigation within sect. 80 of the *Lands Clauses Act*, 1845, and ordered the railway company to pay the costs of the application. From this order the Charity Commissioners appealed.

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shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscriptions, shall be subject to the jurisdiction or control of the said board, or the powers or provisions of this Act, and no portion of any such donation or bequest as last aforesaid, or of any voluntary subscription, which is now or shall or may from time to time be set apart or appropriated and invested by the governing or managing body of the charity, for the purpose of being held and applied or expended for or to some defined and specific object or purpose connected with such charity, in pursuance of any rule or resolution made or adopted by the governing or managing body of such charity, or of any donation or bequest in aid of any fund so set apart or appropriated for any such object or purpose as aforesaid, shall be subject to the jurisdiction or control of the said board or the powers or provisions of this Act; and nothing in this Act shall subject the funds or property of any missionary or other similar society, or the missionaries, teachers, or officers of such society, or of any branch thereof, which funds or property shall not be within the limits of *England* or *Wales*, to the jurisdiction of the said board: Provided always, that the said exemption shall not extend to any cathedral, collegiate, chapter, or other schools."

Sect. 66: "In the construction of this Act, except where the context or other provisions of the Act may require a different construction . . . the expression 'endowment' shall mean and include all lands and real estate whatsoever, of any tenure, and any charge thereon, or interest therein, and all stocks, funds, moneys, securities, investments, and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof; and the expression 'land' shall extend to and include manors, messuages, buildings, tenements, and hereditaments, corporeal and incorporeal, of every tenure and description."

(1) 27 Beav. 651.

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Sir *J. Rigby*, A.G., and *Vaughan Hawkins*, for the Appellants:—

It cannot be contended in this case that the charity is exempted from the jurisdiction of the Charity Commissioners as being wholly maintained by voluntary contributions. Besides voluntary subscriptions, it depends upon the income of endowments, and the sum of Consols out of which the land was purchased was one of these endowments. The case, therefore, comes under sect. 62 of the *Charitable Trusts Act*, 1853. The definition of an endowment is given in sect. 66 of the Act. We do not contend that in all cases voluntary subscriptions if invested become an endowment. They may be invested for a temporary purpose only. But here the fund consisted of the savings and accumulations of unused contributions. Whether such contributions were annual subscriptions, donations, or bequests makes no difference: they were invested as capital, and became an endowment within the meaning of the Act. The contrary construction would make the enactment illusory, for almost every endowment arises originally from a voluntary gift. The 66th section shews that the present state of the fund must be looked at, not its original form. The decision in the *Governors of the Charity for the Relief of Poor Widows and Children of Clergymen* v. *Sutton* (1) was, as we contend, erroneous; but if that decision stands the present case is distinguishable, for the fund in Court is not applicable to the general purposes of the charity. It is the produce of land sold to the railway company under the special power of an Act of Parliament, and is impressed with a trust to be reinvested in land. The corporation have no power independently of the Act to sell the land and apply the purchase-money as they please: *In re Smith* (2); *In re St. John Street Wesleyan Methodist Chapel, Chester* (3); *Attorney-General* v. *Mayor of Newark-upon-Trent* (4); *In re Sir Robert Peel's School at Tamworth* (5). The interference of the Charity Commissioners is not intended to embarrass the corporation, but to assist them and secure them in the manage-

(1) 27 Beav. 651.
(2) 40 Ch. D. 386.
(3) [1893] 2 Ch. 618.
(4) 1 Hare, 395.
(5) Law Rep. 3 Ch. 543.

ment of their funds, and it is to the advantage of the charities that their jurisdiction should be encouraged.

Warmington, Q.C., and *Dibdin*, for the corporation:—

The question now under appeal has been considered to be settled by the *Governors of the Charity for the Relief of Poor Widows and Children of Clergymen* v. *Sutton* (1) ever since the decision of that case. It has been followed in other cases, and many titles depend upon it: *Royal Society of London and Thompson* (2); *In re Corporation of the Sons of the Clergy and Skinner* (3); *Ex parte Western Synagogue* (4). It may be contended that this charity is entirely exempt from the jurisdiction of the commissioners, for all the funds which are applicable to the general purposes of the charity arise from voluntary contributions. But admitting that the charity comes under the second part of sect. 62 as a charity partly maintained by voluntary subscriptions and partly by the income of endowments, the true test of an endowment is that the income only is applicable to the maintenance of the charity. In the present case both capital and income are applicable to the general purposes of the charity. The fact of its investment makes no difference. If it was originally composed of voluntary contributions, there is nothing in the investment which can alter its character. It would be different if the income only were applicable, or if the fund was impressed with a special trust. There is no such special trust here. Whether the Act of Geo. 3 gave power to sell as well as to purchase land cannot affect the question. The difficulty which may be felt in converting the land into money will not give the commissioners jurisdiction if they did not have it otherwise. It could only be a question of title: *Attorney-General* v. *Warren* (5). The Act under which the land was sold—the 56 Vict. c. i., s. 51—says that the corporation shall sell. It therefore implies that they are to have all necessary powers.

Sampson, for the railway company.

(1) 27 Beav. 651.
(2) 17 Ch. D. 407.
(3) [1893] 1 Ch. 178.
(4) 26 Sol. J. 435.
(5) 2 Swans. 291, 302.

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Vaughan Hawkins, in reply.

1894. Aug. 10. DAVEY, L.J., delivered the judgment of the Court (Lord *Herschell*, L.C., *Lindley* and *Davey*, L.JJ.) as follows:—

The real and substantial question on this appeal is whether the *Clergy Orphan Corporation* is subject to the jurisdiction of the Charity Commissioners and to the provisions of the *Charitable Trusts Acts* so far as regards their land in *St. John's Wood*, which is or was the site of their school, but has been sold to a railway company under the provisions of an Act of Parliament. The corporation is undoubtedly a charity within the meaning of the Acts. The question is whether the land and the purchase-money which now represents it are exempted from the jurisdiction by the provisions of sect. 62 of the *Charitable Trusts Act*, 1853. The first exemption is of charities "wholly maintained by voluntary contributions." It is not contended that the corporation is within this description. But we may observe that if these words are read in their widest and most liberal meaning every charity in the kingdom would be exempt, for we suppose that the ultimate source of all charitable endowments is to be found in the spontaneous bounty of founders and supporters. The words are, we think, intended to describe a charity which has no invested endowment yielding an income for its support, but is dependent on the gifts of the benevolent, whether recurrent or occasional, and whether *inter vivos* or by will. The second exemption which applies to this case is in the following words: —[His Lordship read the provision respecting charities maintained partly by voluntary subscriptions and partly by income arising from any endowment, and continued:—]

Before we proceed to comment on this enactment we ask what is meant by an endowment. The interpretation of this word is given in sect. 66, and is as follows: "All lands and real estate whatsoever, of any tenure, and any charge thereon, or interest therein, and all stocks, funds, moneys, securities, investments, and personal estate whatsoever, which shall for the time being belong to or be held in trust for any charity, or for all or any of the objects or purposes thereof." We can see no sufficient reason

for limiting or restricting the meaning of these words, or for confining the words to property held upon some special purpose or trust in connection with a charity as distinguished from the general purposes of the charity. On the contrary, the words "in trust for any charity or for all or any of the objects or purposes thereof," seem to us to preclude any such limited construction. We conclude, therefore, that the words mean what they say, and that all property of every description belonging to or held in trust for a charity, and whether held upon trusts or conditions which render it lawful to apply the capital to the maintenance of the charity, or upon trusts which confine the charitable application to the income, is an endowment within the meaning of the Act.

We return now to sect. 62. We observe that the words used are "voluntary subscriptions." We think that these words are used in a popular sense, and denote recurring gifts repeated annually or otherwise with more or less regularity. Donations or bequests, which would be included as well as subscriptions in the general term contributions, are dealt with in the following sentence. The next words to be noticed are, "partly by income arising from any endowment." Bearing in mind the definition of endowment, we think that these words, if they were not qualified by the subsequent context, would mean, and so far as they are not so qualified do mean, income derived from any invested funds belonging to the charity, and any charity which depends for its maintenance partly on voluntary subscriptions and partly on income from investments would be within the description. The next sentence, however, must be read as a proviso on, or qualification of, the previous enactment, because it is made applicable only to "any such charity as last aforesaid," *i.e.*, to what has been called at the Bar a mixed charity. The effect of this proviso is in our opinion to exempt from the jurisdiction every donation or bequest for the general purposes of the charity which is given on such terms that the capital may legally be applied for the maintenance of the charity, but to leave subject to the jurisdiction an endowment for general purposes the income only of which is applicable to maintenance. We are further of opinion that if the exempted

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donation or bequest or any subscriptions are in fact invested by the governors with the intention that they shall form a permanent fund or endowment, such investments and the income thereof are exempt from the jurisdiction, and such income is excepted from the "income from endowment" in the previous sentence. That this is so is, we think, made clear from the last sentence of the section specially referring to donations, bequests, and voluntary subscriptions which have been invested. This sentence is again a proviso on the immediately preceding words. The effect of it is that the governing body, by appropriating for some specific purpose and investing a donation or bequest, or any subscriptions, which would otherwise be exempt, do not bring such appropriated endowment or the income thereof within the jurisdiction.

We have thus far dealt with the construction of the clause apart from authority. In the case of the *Governors of the Charity for the Relief of Poor Widows and Children of Clergymen* v. *Sutton* (1), Lord *Romilly* put a construction on these sections. Although in the result Lord *Romilly's* conclusion may not differ much from that which we have endeavoured to express, we cannot agree with him in the reasons which he gave for his judgment. We do not think it was a legitimate mode of interpreting the Act first to consider the 62nd section, and then to construe the interpretation clause by the 62nd section of the Act. Lord *Romilly* held that the word "endowment" in the 66th section applied only to endowments for a special purpose in connection with a charity, and not to endowments for the general purposes of the charity. As we have already said, we cannot agree with this construction of the 66th section, and we may add that it seems to us inconsistent with other sections: see, for example, the 44th section. Lord *Romilly's* view has been followed in other cases, but apparently on his authority without the expression of any opinion as to its correctness by the Judges who adopted and followed it. The test whether the property of a charity is an endowment within the meaning of the Act is not whether it is applicable to the general purposes of the charity or only to some specific purpose in connection with it, although this circumstance

(1) 27 Beav. 651.

may be important in considering whether the endowment is exempt from the provisions of the Act in the case of a charity falling within the description in sect. 66.

The corporation now before the Court was incorporated in the year 1809 by an Act of Parliament by which it was recited that the society had been formed in the year 1749, and had been supported by the voluntary subscriptions and donations of charitable and well-disposed persons. The corporation was empowered to purchase and hold lands for the purposes of the charity, and by sect. 2 the governors were empowered to apply and dispose of the moneys and funds already given, and which should from time to time be contributed, and all other moneys and funds belonging to the corporation for the purposes mentioned in the Act, and for any other purpose relating to the corporation, and for the benefit of it at their discretion. In the year 1858 the governors sold out £6400 Consols, part of a larger sum then belonging to the corporation, and out of the proceeds purchased the reversion of the land in *St. John's Wood*, which they then held on lease and on which the school for the clergy orphans had been erected. It was not disputed by the counsel for the commissioners that the Consols so sold out arose from the investment of subscriptions, donations, and bequests which the governors might have legally applied as income. We cannot hold that these subscriptions, donations, and bequests lost that character by being invested in Consols. Did they lose it when the Consols were sold and the proceeds applied in the purchase of land? It seems at first sight a strong thing to hold that lands purchased and held for the purpose of carrying on the charitable work of the corporation are not part of the permanent capital endowment of the corporation. But we are unable to say that the investment in land altered the character of the funds invested. The retention of the lands was not essential to the existence of the charity, for the corporation might have bought or rented schools elsewhere, or a site for other schools might have been given to them. In these circumstances, we cannot hold that the funds ceased to be legally applicable as income at the discretion of the governors. The governors for the time being could not, we think, alter the

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destination of the funds or the trusts upon which they were held by investing them in land, or deprive their successors of the discretion vested in them. We are, therefore, of opinion that the proceeds of the sale of the lands are still applicable as income to the general purposes of the charity, and therefore exempt from the jurisdiction of the commissioners and the powers and provisions of the *Charitable Trusts Acts.*

It is unnecessary to say what would be the case if a charity had no subscription list, and relied for its maintenance wholly on the income of endowments derived from voluntary donations for its general purposes in past years which had been invested and capitalized. We will only observe that it is for those who claim an exemption to make it out, and the provisions of the Act on which we have commented seem to apply only to a charity maintained partly by voluntary subscriptions and partly by income of endowments.

The result of our judgment, therefore, is (1.) that income of any endowment *primâ facie* means income derived from any invested funds; (2.) but that in the case of a charity partly maintained by voluntary subscriptions and partly by the income of any endowment, bequests and donations for the general purposes of a charity which may be lawfully applied as income consistently with the terms of the gift are exempt; and (3.) such gifts and the income thereof are not brought within the jurisdiction by being invested by the governing body.

There remains the question whether the learned Judge was right in directing payment of the £5000 to the corporation. Mr. *Vaughan Hawkins* contended that a charity cannot sell its land by law independently of the *Charitable Trusts Acts.* We think that statement is too broad. A charitable corporation can sell and pass the legal estate to a purchaser, but he takes it subject to the obligation of shewing that the sale was beneficial to the charity and justified by the circumstances: *Attorney-General* v. *Warren* (1). But we doubt whether this principle is applicable to a case where the land represents the investment of funds which the governors are empowered to apply and dispose of for any purpose of the charity at their discretion. The

(1) 2 Swans. 302.

authorities referred to seem to contemplate a case where the land is part of the permanent endowment of a charity the income only of which is applicable by the governors. We are therefore of opinion that if the money in Court were reinvested in land the governors could sell it at their discretion and apply the proceeds as income, and the learned Judge was therefore right in directing payment to the corporation. We are of opinion that the appeal should be dismissed with costs.

Solicitors: *Clabon; Dawes & Sons; Cunliffes & Davenport.*

M. W.

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1894

June 6, 7.

In re EARNSHAW-WALL.

Practice—Taxation—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44) *—General Order under the Act, Sched. I., Part I.—Advowson in gross—Freehold Property.*

An advowson in gross though an incorporeal hereditament is freehold property within the meaning of Sched. I., Part I., to the order made in pursuance of the *Solicitors' Remuneration Act*, 1881, and on a purchase and sale the scale charge applies.

In re Stewart (1) discussed and distinguished.

ADJOURNED SUMMONS to review taxation.

The Applicant was employed to carry out the purchase by private contract of an advowson in gross, the purchase-money being £1400, and on the completion delivered to the client his bill of costs in respect of the business done made out on the old system as altered by Sched. II. to the Order made in pursuance of the *Solicitors' Remuneration Act*, 1881.

An order to tax the bill having been obtained, the Taxing Master taxed the bill on the footing of the purchase being one to which rule 2, sub-rule (*a*), and the scale in Sched. I., Part I. of the General Order was applicable.

This was a summons by the solicitor asking that it might be referred back to the Taxing Master to tax the bill according to the old system as altered by Sched. II.

Chaster, for the Applicant:—

An advowson in gross is an incorporeal hereditament, and is not "freehold property" within the meaning of Sched. I. The schedule contemplates the sale and purchase of land held as freehold, copyhold, or leasehold property. The decision in *In re Stewart* is applicable to this case. An advowson is not land and the scale charge does not apply.

Ryland, for the client:—

An advowson is clearly freehold property: *Cleer* v. *Peacock* (2), *Hughes'* Parsons' Law (3), and therefore comes within the

(1) 41 Ch. D. 494. (2) Cro. Eliz. 359.

(3) Ed. 1673, pp. 48, 49.

schedule. The decision in *In re Stewart* (1) turned on the particular circumstances of that case. Mr. Justice *Kay* was not dealing with the general question, he did not express an opinion that the term "property" did not include incorporeal hereditaments. I submit that in this case the scale charge applies.

Chaster, in reply.

CHITTY, J.:—

On the purchase of an advowson in gross for the sum of £1400 the Taxing Master has taxed the bill of costs of the purchaser's solicitor according to the scale prescribed by Sched. I., Part I., of the General Order. The solicitor is not content with that taxation, and says that the purchase of an advowson does not fall within the scope of the scale charges, and that he ought to be remunerated according to the old system as altered by Sched. II.

The material words in the order are "freehold, copyhold, or leasehold property." The expression "property" is not a term of ancient art. The word is discussed in *Williams* on Real Property, and incorporeal hereditaments are found under the title of real property. In that work there is a well-reasoned explanation of the term "property" (2) which shews that it is used in three senses, two of which I should call the leading senses. "Property" may denote the thing to which a person stands in a certain relation, and also the relation in which the person stands to the thing. The term as used in the schedule may be used in both or either of these senses.

The argument used against the Taxing Master's certificate is that the term "property" in the schedule means land—that is to say, corporeal hereditaments—and that an advowson, being an incorporeal hereditament and not land, does not fall within the term "property" as used in the schedule, and therefore that the scale charges do not apply. I do not, however, find the word "land" used in the schedule, and I can find nothing to enable me to cut down the term "property" to land.

Looking at the schedule, the "property" referred to therein is

(1) 41 Ch. D. 494. (2) 17th Ed. pp. 3, 4.

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property in respect of which title is deduced, and in respect of which there is a conveyance. The words are, "for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance." There are some sales on which there is no deduction of title as the sale of chattels and such-like; but there is equally a deduction of title on the sale of corporeal and incorporeal hereditaments, and the title to an advowson must be deduced, whether it is an advowson appendent or an advowson in gross. Moreover, an advowson in gross is a freehold. It is the subject of tenure, and may be held by homage, fealty, and escuage; it was also devisable under the statute of *Henry* VIII. If the term "property," as used in the schedule, is to be taken in the sense of the interest which a man has in a thing, a man can have a freehold interest in an advowson, whether for life or in tail or in fee simple. A man may also have a lease for a term in an advowson.

I cannot see on what ground I should be justified in making, or that I ought to make, any distinction for the purposes of the rule between corporeal and incorporeal hereditaments. The deduction of title is a common feature in both cases. That being so, and for the reasons which I have already given, I think I ought to affirm the certificate.

But it is said that the case of *In re Stewart* (1) is opposed to what I have decided. The question there related to the costs of the purchase and grant of the right or easement of laying and maintaining pipes through the lands of other persons which the corporation obtained under the powers of their special Act, and no land whatever was conveyed, and Mr. Justice *Kay* held that the scale charges did not apply, saying in the course of his judgment (2): "Can the grant of an easement like this be considered a conveyance of freehold, copyhold, or leasehold property within the meaning of that schedule? I confess it seems to me difficult so to hold. Obviously the schedule contemplates *primâ facie* conveyances of land held as freehold, copyhold, or leasehold property, and the scale is fixed upon the purchase-money which is paid when such property changes hands. When a mere easement is granted there is no change of

(1) 41 Ch. D. 494. (2) 41 Ch. D. 506.

property in that sense, and the purchase-money is comparatively trifling in amount." His words had reference to the particular circumstances of the case before him; he was not dealing with the general question, nor with the question of property passing by conveyance; he did not express any decided opinion on the point before me. I should feel bound to follow him if I thought he intended to lay down the proposition that the term "property" did not include incorporeal hereditaments; but, as I consider he did not so intend, I am free to decide as I do. I hold, therefore, that the Taxing Master is right, and I dismiss the summons with costs.

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Solicitors: *Earnshaw-Wall; Belfrage & Co.*, agents for *Byrch & Cox, Evesham.*

G. M.

NATIONAL DWELLINGS SOCIETY *v.* SYKES.

CHITTY, J. 1894 *June* 29.

[1894 N. 828.]

Company—General Meeting—Conduct and Power of Chairman.

It is the duty of a chairman to preserve order, conduct proceedings regularly, and take care that the sense of the meeting is properly ascertained with regard to any question before it; but he has no power to stop or adjourn a meeting at his own will; and if he purports to do so, it is competent for the meeting to resolve to go on with the business for which it has been convened, and to appoint another chairman for that object.

MOTION.

The National Dwellings Society, Limited, was incorporated under the *Companies Acts* in 1875. By its articles of association the business of the society was to be managed by a council, who were invested with all the usual powers of directors. One-fifth of the members of the council were to retire at the annual general meeting in every year, when new or retiring members were to be elected or re-elected. The statement of accounts for each year was also to be submitted to the members at the annual general meeting, and a printed copy of the certified balance-sheet was to be sent to every shareholder previous to the holding of the annual general meeting. The articles also provided that a member of the council should preside at every general meeting of the society; but if no such member should be present within fifteen minutes

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after the time appointed for holding the meeting, the members present should choose one of their own number to preside at the meeting; that any ordinary meeting might, without any notice in that behalf, receive, and either wholly or partially reject, or adopt and confirm, the accounts, balance-sheets, and reports of the council and auditors respectively. The auditors were also to be elected at the annual meeting.

In April, 1894, the council issued to the shareholders a balance-sheet and revenue account with a report, and a notice convening the annual general meeting for the 12th of April, 1894. On the 4th of April a circular was sent out by a shareholder to all the other shareholders stating that a resolution would be proposed at the annual meeting for the appointment of a committee of shareholders to investigate the affairs of the society, and asking for proxies.

When the annual general meeting was held, thirty-five shareholders attended. The chair was taken by the Defendant *Sykes*, a member of the council, who moved a resolution, "That the report and accounts be received," and this was seconded by another member of the council. To this an amendment was moved and seconded by shareholders, that a committee of investigation be appointed to ascertain the position of the company. After some discussion the chairman ruled this amendment out of order, on the ground, that no special notice had been given, and stated that under the advice of his solicitor, he should refuse to put the amendment to the meeting. Ultimately the chairman put the original resolution, and took a shew of hands upon it, and declared that there were six votes in favour of the motion and twenty-eight votes against it, and then said, "I declare the resolution to be lost, and I dissolve the meeting," and left the chair and the room with his supporters, though the election of directors and auditors, which formed part of the business of the annual meeting, had not been disposed of.

The shareholders in the room afterwards unanimously elected another shareholder to be chairman, and unanimously passed certain resolutions, including one for the adjournment of the meeting for six weeks. At the adjourned meeting, which the Defendant *Sykes* did not attend, a committee of investigation

was appointed to look into the affairs of the society. This committee commenced the present action against the council, adding the name of the society as a co-Plaintiff, and now moved for an interim injunction to restrain the Defendants from preventing the Plaintiffs, other than the society, and the auditors, from having full access to the securities, books, and papers of the society, and from prosecuting the investigation authorized by the meeting as aforesaid. There was a cross-motion by the council to strike out the name of the society as Plaintiffs; but this question, as well as one on the validity of the appointment of the committee of investigation, was eventually adjourned, at the suggestion of the Court, till after a further meeting of the society had been held, and the only point argued which calls for any report was, as to the legality of the chairman's conduct at the meeting of the 12th of April.

Byrne, Q.C., and *Theobald*, for the Plaintiffs:—

The chairman exceeded his powers in declaring the meeting at an end; it was within the power of the meeting to resolve to go on with the business for which it had been convened, and appoint another chairman. The chairman has no power to interrupt, adjourn, or postpone the business of the meeting; his duty in the chair is merely to regulate the proceedings, and, as far as he can, to forward the business which the meeting is assembled to dispatch: *Prideaux's* Churchwarden's Guide (1).

Levett, Q.C., and *Bramwell Davis*, for the Defendants:—

If the chairman makes a mistake, and declares the meeting adjourned or dissolved, the meeting cannot remedy it by going on with a fresh chairman; a new meeting must be convened. We contend that a chairman can adjourn a meeting though against the wish of the majority: *Reg.* v. *D'Oyly* (2); he has full power to decide all incidental questions which arise at the meeting: *In re Indian Zoedone Company* (3).

[CHITTY, J., referred to *Burns'* Justice of the Peace (4): "The right of adjourning the meeting is not in the minister or any

(1) 15th Ed. p. 158.
(2) 12 A. & E. 139.
(3) 26 Ch. D. 70.
(4) 29th Ed. vol. vi. p. 336.

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other person as chairman, . . . but in the whole assembly, where all are upon an equal footing."]

Even if the chairman was wrong the resolution as to a committee of investigation, passed at the adjourned meeting, was invalid.

[*Henderson* v. *Bank of Australasia* (1) was also referred to.]

CHITTY, J.:—

A question of some importance has been mooted in this case, with regard to the powers of the chairman over a meeting. Unquestionably it is the duty of the chairman, and his function, to preserve order, and to take care that the proceedings are conducted in a proper manner, and that the sense of the meeting is properly ascertained with regard to any question which is properly before the meeting. But, in my opinion, the power which has been contended for is not within the scope of the authority of the chairman—namely, to stop the meeting at his own will and pleasure. The meeting is called for the particular purposes of the company. According to the constitution of the company, a certain officer has to preside. He presides with reference to the business which is there to be transacted. In my opinion, he cannot say, after that business has been opened, "I will have no more to do with it; I will not let this meeting proceed; I will stop it; I declare the meeting dissolved, and I leave the chair." In my opinion, that is not within his power. The meeting by itself (and these articles certainly apply to what I have said) can resolve to go on with the business for which it has been convened, and appoint a chairman to conduct the business which the other chairman, forgetful of his duty or violating his duty, has tried to stop because the proceedings have taken a turn which he himself does not like. I think perhaps what I have said is sufficient for the present purpose, and I need say no more except that the other questions raised by this application will stand adjourned till after the general meeting has been held as arranged.

Solicitors: *Linklater & Co.; Myers & Co.*

(1) 45 Ch. D. 330. W. C. D.

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1894
July 13, 20.

LAMBTON *v.* MELLISH.

[1894 L. 1392.]

LAMBTON *v.* COX.

[1894 L. 1391.]

Injunction—Nuisance arising from Noise—Noise caused by the Acts of Two or More Persons.

The acts of two or more persons may, taken together, constitute such a nuisance that the Court will restrain all from doing the acts constituting the nuisance although the annoyance occasioned by the act of any one of them if taken alone would not amount to a nuisance.

The *dictum* of *James*, L.J., in *Thorpe* v. *Brumfitt* (1), approved of and followed.

MOTION.

The Plaintiff was the lessee and occupier of a house adjoining *Ashstead Common* in *Surrey*. The premises of the Defendant *Mellish* were about 60 or 70 yards from the Plaintiff's premises, and those of the Defendant *Cox* were about 120 or 130 yards from the Plaintiff's premises and about 100 yards from those of the Defendant *Mellish*, and were separated from both by a line of railway.

It appeared that during the summer months a large number of school treats and assemblages of that description took place on *Ashstead Common*.

The Defendants *Mellish* and *Cox* were rival refreshment contractors who catered for visitors and excursionists to the common, and both the Defendants had merry-go-rounds on their premises, and were in the habit of using organs as an accompaniment to the amusements.

It appeared from the evidence that these organs were for three months or more in the summer continuously being played together from 10 or 11 A.M. till 6 or 7 P.M., and that the noise caused by the two organs was "maddening."

The organs used by *Mellish* had been changed, and it was

(1) Law Rep. 8 Ch. 650, 656.

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alleged by him that the organ in use when the motion was made was a small portable hand-organ making comparatively little noise. That used by *Cox* was a much larger one provided with trumpet stops and emitting sounds which could be heard at the distance of one mile.

The Plaintiff now moved against the Defendant in each action for an injunction restraining him from playing any organs so as to cause a nuisance or injury to the Plaintiff or his family, or other the occupiers of the Plaintiff's property.

Farwell, Q.C., and *Borthwick*, for the Plaintiff in both actions:—

Although it is possible that the noise made by the Defendant *Mellish's* organ is slight compared with that made by the Defendant *Cox*, *Mellish* is nevertheless contributing to the noise and is responsible with the Defendant *Cox* for the aggregate noise which constitutes the nuisance complained of. The judgment of Lord Justice *James* in *Thorpe* v. *Brumfitt* (1) is directly in point.

Whitehorne, Q.C., and *Butcher*, for the Defendant *Mellish*:—

What *Mellish* is doing is in itself lawful, and no injunction will be granted to restrain a man from doing that which is lawful, and which if taken by itself is no nuisance. In order to obtain an injunction the Plaintiff must shew that *Mellish* is acting in concert with *Cox*. It does not follow that if an injunction will lie against *Cox* it will necessarily lie against *Mellish*. *Thorpe* v. *Brumfitt* has no application, as there the acts complained of were in themselves unlawful.

Moloney, for the Defendant *Cox*.

CHITTY, J.:—

Notwithstanding the conflict of evidence, I am of opinion that the Plaintiff is entitled to the injunction he asks for as against the Defendant in each action.

(1) Law Rep. 8 Ch. 650, 656.

A man may tolerate a nuisance for a short period. A passer-by or a by-stander would not find any nuisance in these organs; but the case is very different when the noise has to be continuously endured: under such circumstances it is scarcely an exaggeration to term it "maddening," going on, as it does, hour after hour, day after day, and month after month. I consider that the noise made by each Defendant, taken separately, amounts to a nuisance. But I go further. It was said for the Defendant *Mellish* that two rights cannot make a wrong—by that it was meant that if one man makes a noise not of a kind, duration, or degree sufficient to constitute a nuisance, and another man, not acting in concert with the first, makes a similar noise at the same time, each is responsible only for the noise made by himself, and not also for that made by the other. If the two agreed and acted in combination each would be a wrongdoer. If a man shouts outside a house for most of the day, and another man, who is his rival (for it is to be remembered that these Defendants are rivals), does the same, has the inhabitant of the house no remedy? It is said that that is only so much the worse for the inhabitant. On the ground of common sense it must be the other way. Each of the men is making a noise and each is adding his quantum until the whole constitutes a nuisance. Each hears the other, and is adding to the sum which makes up the nuisance. In my opinion each is separately liable, and I think it would be contrary to good sense, and, indeed, contrary to law, to hold otherwise. It would be contrary to common sense that the inhabitants of the house should be left without remedy at law. I think the point falls within the principle laid down by Lord Justice *James* in *Thorpe* v. *Brumfitt* (1). That was a case of obstructing a right of way, but such obstruction was a nuisance in the old phraseology of the law. He says (2): "Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not shew what share each had in causing it. It is probably impossible for a person in the plaintiff's position to shew this. Nor do I think it necessary that he should shew it. The amount of obstruction caused by any one of them might not, if it stood

(1) Law Rep. 8 Ch. 650. (2) Law Rep. 8 Ch. 656.

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alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant." There is in my opinion no distinction in these respects between the case of a right of way and the case, such as this is, of a nuisance by noise. If the acts of two persons, each being aware of what the other is doing, amount in the aggregate to what is an actionable wrong, each is amenable to the remedy against the aggregate cause of complaint. The Defendants here are both responsible for the noise as a whole so far as it constitutes a nuisance affecting the Plaintiff, and each must be restrained in respect of his own share in making the noise. I therefore grant an interim injunction in both the actions in the terms of the notices of motion.

Solicitors: *Miller, Smith, & Bell; Carr & Son; Francis Rudall.*

G. M.

CHITTY, J. 1894 *July* 20, 25.

In re SIR TITUS SALT, BART., SONS, AND COMPANY'S APPLICATION.

Trade-mark—"Invented Word"—Geographical Name—"Eboline"—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *s.* 64—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10, *sub-ss.* (*d*) (*e*).

A word already in existence cannot properly be said to be an "invented word" because the person claiming to have invented it was not aware of its existence.

The word "*Eboline*" being a word compounded of the word "*Eboli*" (the name of a town in *Italy*) with the English suffix "ne," is not an "invented word" within the meaning of sub-sect. (*d*) of sect. 64 of the *Patents, Designs, and Trade Marks Act*, 1883, as amended by sect. 10 of the Act of 1888, and it is a "geographical name" within the meaning of sub-sect. (*e*) of the same section.

The prohibition contained in sub-sect. (*e*) is not confined to the use of

the noun substantive, but it extends to the adjective and to the name of a place to which an ordinary English suffix has been added so as to impart to it an adjectival form.

MOTION.

In the month of February, 1894, the above-named company applied to register the word "*Eboline*" as a trade-mark in respect of silk piece goods in class 31.

In April, 1894, the Registrar of Trade Marks, acting for the Comptroller-General, refused to proceed with the application on the ground that "*Eboli*" was the name of a state or town in *Italy*, and that the mark did not consist of any of the essential particulars required by s. 64 of the *Patents, Designs, and Trade Marks Act*, 1883, as amended by s. 10 of the *Patents, Designs, and Trade Marks Act*, 1888, as a condition of the registration of a new trade-mark.

The Applicants thereupon appealed to the Board of Trade, and the appeal was referred to the Court.

Sect. 64 of the Act of 1883, as amended by sect. 10 of the Act of 1888, so far as is material, is as follows:—

"(1.) For the purposes of this Act, a trade-mark must consist of or contain at least one of the following essential particulars:—

(*d*) An invented word or invented words;

or,

(*e*) A word or words having no reference to the character or quality of the goods, and not being a geographical name."

From the evidence of the Applicants' manager it appeared that he had invented the word "*Eboline*," and had never heard before the date of the refusal to register that "*Eboli*" was the name of a state or town in *Italy*, but that he had since learnt that *Ebeli* was a town in the south of *Italy*, containing about 11,000 inhabitants, and further that silk piece goods were not manufactured there, and that it was not a place where anything was manufactured commercially except wine and oil.

Byrne, Q.C., and *John Cutler*, for the Applicants, contended that the word, being an invented word, was, although it turned out that there was a town in *Italy* named "*Eboli*," within

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sub-sect. (*d*), and that it was not a geographical word within the meaning of sub-sect. (*e*).

Ingle Joyce, for the Comptroller-General.

CHITTY, J.:—

This is a motion for an order directing the Comptroller to proceed with an application to register as a new trade-mark the word "*Eboline*," in class 31, for silk piece goods. The question depends on the 64th section of the *Patents, Designs, and Trade Marks Act*, 1883, as amended in 1888, which requires that a trade-mark must consist of or contain at least one of the enumerated essential particulars, amongst which are—sub-sect. (*d*)—an invented word and—sub-sect. (*e*)—a word having no reference to the character or quality of the goods, and not being a geographical name. The Applicants' manager says that he invented the word "*Eboline*," and no doubt he is speaking honestly according to his belief. But it appears that "*Eboli*" is the name of an Italian town of 11,000 inhabitants, mentioned in the *Gazetteer*. The mere addition of the common English termination "ne" is not sufficient to make the word an invented word—a word already in existence cannot properly be said to be an invented word because the person claiming to have invented it was not aware of its existence. If it were otherwise, the fewer words a man knows the more readily could he invent. What the Act requires is that the word should be an invented word in fact, and not merely in the belief of the person claiming to register it as a trade-mark. "*Eboline*," therefore, is not an invented word within sub-sect. (*d*). This point was not much pressed; but it was urged that "*Eboline*" was not a geographical name within sub-sect. (*e*). The prohibition, however, is not confined to the use of the noun substantive; it extends, in my opinion, to the adjective, and to the name of a place to which an ordinary English suffix has been added so as to impart to it an adjectival form. To hold the contrary would be to reduce the prohibition to a dead letter for all practical purposes. For instance, it is plain that *America, Asia, Africa, Europe, China, Japan, Argentina, Circassia, Anatolia, Rome, Paris, Florence*, and *Venice* fall within

the prohibition; it is equally plain, I think, that the adjectival forms of these places cannot be used—*i.e.*, American, Asiatic, African, European, Chinese, Japanese, Argentine, Circassian, Anatolian, Roman, Parisian, Florentine, or Venetian. This reasoning applies to "*Eboline*"; it is merely "*Eboli*," with the addition of the ordinary English suffix "ne." The object of the Legislature was to prevent a trader from acquiring a monopoly in the name of a place, and from thereby suggesting that the goods had a local origin or a local connection, which in fact they might not have. The enactment practically overrules Lord *Westbury's* decision in *McAndrew* v. *Bassett* (1), where he held that the geographical expression *Anatolia*, which had been used for a short time in connection with liquorice, was a good trade-mark. For these reasons I hold that the word "*Eboline*" cannot be registered.

Solicitors: *Salaman*; *Solicitor to the Board of Trade.*

G. M.

KEEN *v.* DENNY.

[1894 K. 403.]

Ecclesiastical Law—Advowson—Right of Presentation—Turns of Patronage—Exchange of Livings—Usurpation.

As between patrons with alternate turns of presentation to a benefice, a presentation on an exchange of livings must be reckoned as a turn; and if one patron wrongfully usurp the turn of another, the order of turns of presentation is not thereby altered, but the ousted patron (after six months) loses his turn, and cannot requite himself by usurping against the wrong-doer by way of retaliation; and on this point there is no distinction between usurpation by a total stranger, and usurpation by a person privy in, or party to the, title.

Richards v. *Earl of Macclesfield* (2) and *Birch* v. *Bishop of Litchfield* (3) discussed and applied.

SPECIAL CASE.

The question raised in this action related to the right of presentation to the church of *All Saints, Hatcham Park*, an

(1) 4 D. J. & S. 380. (2) 7 Sim. 257.
(3) 3 Bos. & P. 444.

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ecclesiastical district formed out of the parish of *St. James, Hatcham*, in the diocese of *Rochester*; the points argued being—(1.) whether, as between two patrons with alternate turns, a presentation on an exchange was to be counted as a turn, and (2.) whether a wrongful presentation by one patron altered the original order of turns, so as to give the other patron another turn in compensation for the turn so usurped.

By a deed-poll of the 30th of August, 1871, under the hands and seals of the Bishop of *Rochester*, *Robert Tooth*, the patron, and the Rev. *Arthur Tooth*, the incumbent, of *St. James', Hatcham*, in pursuance of the provisions in that behalf contained in 8 & 9 Vict. c. 70, intituled "An Act for the further Amendment of the *Church Building Acts*," and in 11 & 12 Vict. c. 37, intituled "An Act to Amend the law relative to the Assignment of Ecclesiastical Districts," the bishop, patron, and incumbent thereby respectively agreed and declared mutually the one with and to the other of them, and with and to all other persons whomsoever: "That the perpetual right of patronage of and of nominating a minister to the said new church shall, upon the due consecration of the said church, be vested in and exercised by the persons hereinafter mentioned (that is to say) for the first and second turns after such consecration by" certain named persons as trustees for certain subscribers towards the building of the church, and now represented by the Defendants, "and for the third turn after such consecration as aforesaid by" certain other named persons as trustees for the *Haberdashers' Company*, who had given the site, and now represented by the Plaintiffs, "and so on for ever thereafter the said patronage shall be exercised by the said trustees alternately as aforesaid, that is to say, every two turns by the said first-mentioned trustees, their heirs and assigns, and every third turn by the said last-mentioned trustees, their heirs and assigns."

Shortly after the execution of this deed the new church was duly consecrated, the benefice being known as the church of *All Saints, Hatcham Park*.

In 1871 the Defendants nominated the Rev. *Edward Wynne* to the benefice. In 1878 the Rev. *E. Wynne* exchanged the benefice for that of *Manningham, Bradford*, held by the Rev.

Robert Gardner Smith, and for the purpose of such exchange resigned the benefice, and the Defendants, at the request of the exchanging parties, nominated the Rev. *R. G. Smith* to the benefice, and he was duly licensed thereto. In 1886 the Rev. *R. G. Smith* exchanged the benefice for the rectory of *Wadingham, Lincolnshire*, then held by the Rev. *Walter Lancelot Holland*, and the Defendants, at the request of the exchanging parties, presented that clergyman to the benefice, and he was instituted and inducted thereto. In 1891 the Rev. *W. L. Holland* resigned the benefice, and the Defendants presented the Rev. *John Bousted Mylius*, and he was instituted and inducted thereto. The several nominations or presentations of the Rev. *E. Wynne*, the Rev. *R. G. Smith*, the Revs. *W. L. Holland*, and *J. B. Mylius* were made without the concurrence or consent or any previous notice to the persons for the time being constituting the body of trustees represented by the Plaintiffs. On the 11th of January, 1894, the Rev. *J. B. Mylius* died. On the 14th of March, 1894, the Plaintiffs presented the Rev. *Sydney Powell Townend* to the benefice. On the 27th of March, 1894, the Defendants presented the Rev. *Ernest Scott Fardell* to the same benefice. Neither of those two clergymen had yet been instituted or inducted thereto, and the Bishop of *Rochester* declined to institute or direct the induction of either until it was determined in whom the right of presentation was vested. The question submitted for the opinion of the Court was whether the Plaintiffs or the Defendants were entitled to nominate or present a minister to the benefice on the present vacancy thereof.

Sir *W. Phillimore*, and *A. Whitaker*, for the Plaintiffs:—

We have a right to present after the Defendants have had two turns; we are not to be deprived of this right because the Defendants have had three turns or more. If co-parceners cannot agree to present on a vacancy, they must then take it by turns: *Barker* v. *Bishop of London* (1); *Thrale* v. *Bishop of London* (2); but there is no law and no principle which makes the cycle of turns sacred. The *semble* at the end of the headnote to *Birch* v. *Bishop of Litchfield* (3), and at the end of the

(1) Willes, 659. (2) 1 H. Bl. 376. (3) 3 Bos. & P. 444.

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report (1), is the only authority on this subject, the main argument being on a point of pleading, though *Richards* v. *Earl of Macclesfield* (2) seems to shew that you must keep to the cycle. The case of an incumbent being made a bishop is analogous, for then, when the right of presentation devolves in turns, the exercise of the prerogative by the Crown does not disturb the order of turns: *Grocers' Company* v. *Archbishop of Canterbury* (3).

Then, again, there is a distinction between usurpation by a total stranger, and usurpation by persons privy to the title, as the Defendants were.

The Plaintiffs have not been guilty of any negligence, for they were not bound to know of these resignations. The patron is bound to know of a vacancy caused by the death or promotion of an incumbent; but, if an avoidance be by resignation or deprivation, the six months should not commence till notice of the avoidance is given by the ordinary to the patron: *Comyns'* Digest, title *Esglise* (4); *Mallory* on *Quare Impedit* (5); *Phillimore's* Ecclesiastical Law (6). A presentation on an exchange ought not to count, because it was the duty of the Defendants to give us notice before the presentations were made, by analogy to the case of the ordinary giving notice to the patron in case of a resignation before collating; besides, a "turn" involves a full right of selection, whereas in an exchange, the patron in effect does not really exercise any right of patronage or selection; everything is cut and dried before he is applied to, and if any part of the exchange fails, the parties are restored to their original position; therefore, a presentation on an exchange is not a turn of patronage.

Another argument that may be urged in a Court of Equity is, that natural justice requires that the person against whom usurpation has been made, ought now to be allowed to stand in the usurper's place.

On these grounds, we submit that the present vacancy is really the third turn, and that the presentation belongs to us.

(1) 3 Bos. & P. 453.
(2) 7 Sim. 257.
(3) 3 Wils. 214.
(4) H. (9).
(5) Page 121; "Lapse," pl. (7).
(6) Pages 407, 489.

F. H. L. Errington, for the Defendants:—

There is no difference between a presentation on an exchange and an ordinary presentation, for the patrons present "cross *de novo*": *Colt* v. *Bishop of Coventry* (1). It is not mere machinery; the patron has a voice in the matter; he can refuse to present the clerk suggested to him. That the outgoing and incoming clerks on an exchange, stand in law in the relation of predecessor and successor, just as in any ordinary presentation, is clear from *Downes* v. *Craig* (2), which was an action for dilapidations against the outgoing clerk. The only exception is where the presentation is taken away by law, as on a prerogative presentation; but then "the act in law shall work no prejudice": *Coke* on *Litt.* (3).

As between co-parceners entitled to present in turns, the effect of usurpations by a stranger, or one claiming wrongfully under the co-parcener, is not to alter the order of turns, but to deprive the particular parcener of her right: *Richards* v. *Earl of Macclesfield* (4); and the person wronged cannot requite himself by usurping against his wrongdoer by way of retaliation: *Birch* v. *Bishop of Litchfield* (5), which, in effect, decides this very point, though, I admit, the main argument in that case was on the pleadings. [He also referred to *Elvis* v. *Archbishop of York* (6); *Brooke*, Abr., Presentations al Esglise (7); *Stephens'* Commentaries (8).] These authorities deal with the whole advowson; but the same rule applies to turns of presentation now, that since 7 Anne, c. 18, which supplements the *Statute of Westminster* (13 Edw. 1, c. 5, s. 5), the whole advowson is not lost by one usurped presentation: 17 *Vin.* Abr. (9). So, too, with co-parceners, the one usurped upon must wait until her turn comes round again: 17 *Vin.* Abr. (10).

Usurpations operated to destroy the turn, even in the case of the King: *Basset* v. *Gee* (11); *Bishop of London* v. *Mercers'*

(1) Hob. 140, 152.
(2) 9 M. & W. 166.
(3) 379 a.
(4) 7 Sim. 257.
(5) 3 Bos. & P. 444.
(6) Hob. 315, 321.
(7) 20.
(8) 11th Ed. vol. iii. p. 448.
(9) 405 (8), (13); 404 (4), (5); 408 (8).
(10) 329 K. a, (9); and 327, I. a, (2), (3).
(11) Cro. Eliz. 790.

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Company (1). These authorities, and *Birch* v. *Bishop of Litchfield* (2), seem to make it reasonably clear that if the Plaintiffs have missed their turn of presentation, they cannot now take one of ours by way of retaliation.

Then as to notice, the absence of personal notice on a resignation is immaterial where there has been induction. Induction is notice to all the world: *Servien* v. *Bishop of Lincoln* (3); *Leak* v. *Bishop of Coventry* (4).

The cycle of turns being once established is sacred, and cannot be altered. This is now the fifth turn, and therefore ours by the deed of 1871.

As to the Plaintiffs' reference to natural justice, and this being a hard case, that has nothing to do with a question of real property law relating to an advowson, and the matter must be decided just as it would on a *quare impedit.*

Phillimore, in reply:—

No doubt, induction is notice to all the world; but there was no negligence on Plaintiffs' part in allowing these incumbents to be inducted: it was not our duty to know that the living was vacant by resignation; in all the cases where "negligence" is applied there was something the patron was supposed to know. I admit that usurpation puts the other party out of possession, and drives him to his writ of right; and this is what the cases referred to from *Viner's* Abr. relate to. [He also referred to *Robinson* v. *Marquis of Bristol* (5).] But the facts of this case do not amount to an usurpation. The patron on an exchange gets a veto and nothing more—no exercise of patronage.

1894. Aug. 11. CHITTY, J.:—

The deed of 1871, whereby the advowson or perpetual right of patronage stands limited, is clear. The first and second turns go to the trustees now represented by the Defendants; the third to the trustees now represented by the Plaintiffs; the fourth and fifth to the Defendants; the sixth to the Plaintiffs; and so on for ever in this fixed and prescribed order throughout the cycle.

(1) Fitzg. 247; 2 Str. 925.
(2) 3 Bos. & P. 444.
(3) 17 Vin. Abr. 338.
(4) Cro. Eliz. 811.
(5) 11 C. B. 208, 241.

Nothing turns on the fact that the persons entitled to the turns are trustees; the question is simply one of common law right, unaffected by any equity as between the contending parties. The facts are not in dispute. [His Lordship here stated the facts, and, after observing that the exchanges were carried out in the usual way by presentation of the patron, continued:—]

On these facts it is argued for the Plaintiffs that the presentations on the two exchanges ought not to be counted, and consequently that this is the third turn, and that the right of presentation is with the Plaintiffs. If the presentations on the exchanges are to be reckoned, this is not the third, but the fifth turn. In my opinion, they must be reckoned. It seems to me impossible to sever the form, from the substance, on an exchange. Each clerk resigns, and the patrons of the two livings present to the respective vacancies. Each patron acts of his own free will in the matter; he is under no obligation to present the new clerk; he has the right to refuse; and if he does so, the exchange cannot take place. No authority was cited, nor, so far as I am aware, exists, for excluding from the computation of the turns a presentation on an exchange. On an exchange the outgoing and the incoming clerks stand in law in the relation of predecessor and successor. This relation is well illustrated by *Downes* v. *Craig* (1), where it was decided that on an exchange, the incoming clerk as successor, was entitled to maintain an action for dilapidations against the outgoing clerk as predecessor, just as in the case of succession on death. The case of an incumbent being promoted to a bishopric was relied on by the Plaintiffs' counsel as analogous, but it has no bearing. In that case the right to fill the vacancy falls to the Crown by virtue of the Royal prerogative; and where, as among co-parceners or the like, the right of presentation devolves in turns, the exercise of the prerogative right is not counted, and does not disturb the settled order of the turns: see *Grocers' Company* v. *Archbishop of Canterbury* (2). The reason is that *actus legis nemini facit injuriam*: see *Co. Litt.* (3). The Crown's action being lawful, it is not allowed to operate to the injury of the person entitled to the next turn, and consequently, it is not

(1) 9 M. & W. 166. (2) 3 Wils. 214. (3) 379 a.

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reckoned, as between private persons entitled in turns. The result thus far, then, is that the third turn, which of right belonged to the Plaintiffs, was exercised by the Defendants. This being so, the third presentation by them was wrongful; but it is now too late to recall what was done; the remedy of the Plaintiffs was lost after the expiration of the time within which an action in the nature of a *quare impedit* could have been brought. From this it follows that the Defendants were, in the language of the old lawyers, usurpers: they usurped the third turn. Now, as between co-parceners entitled to present in turns, it is clear that the effect of the usurpation by a stranger, or one claiming, but wrongfully claiming, under the co-parceners, is not to alter the order of the turns, but to deprive the particular co-parcener entitled to the turn of her right to present. For this proposition it is sufficient to cite *Richards* v. *Earl of Macclesfield* (1) and *Vin.* Abr. title Usurpation (2), where it is stated that if two co-parceners make partition to present by turn the one may usurp against the other, but such usurpation does not bind her upon whom the usurpation is at her next turn, but that she may present. The usurpation supplies the turn on the particular avoidance, and leaves the order of the turns otherwise unaffected. Now, neither on principle nor authority can I find myself justified in drawing any distinction between usurpation by a stranger, and usurpation by a person party to a deed, or claiming under a party to a deed, limiting the turns. In both cases alike the usurper must be deemed to know the rights, and that he himself is acting wrongly. The person wronged, who has lost his only and peculiar remedy (by writ of *quare impedit*) by lapse of time, cannot requite himself by usurping against his wrongdoer by way of retaliation. The point is very neatly and forcibly put by *Chambre*, J., in *Birch* v. *Bishop of Litchfield* (3), where he says: "If the plaintiff did usurp upon the defendant, still I think we could hardly say that the defendant may now usurp upon the plaintiff by way of retaliation." The decision in that case turned upon the plea, which the Court held to be too loose and uncertain, on the point whether the plaintiff had presented to the turn by usurpation or

(1) 7 Sim. 257.

(2) K. c., pl. 4, 5.

(3) 3 Bos. & P. 453.

by agreement between him and the person whose turn it was to present. In his judgment Lord *Alvanley* said that, supposing the plaintiff to have usurped upon the defendant, he did not wish to give any opinion what operation that usurpation had upon the turn then in dispute, though, as then advised, he thought that, inasmuch as it was the defendant's fault for permitting such usurpation, he must suffer for his own negligence. This *dictum* is adverse to the Plaintiffs' contention. But, although the old books teem with authorities on the subject of usurpations, the Plaintiffs' counsel, whose industry has been indefatigable, have not been able to produce any authority justifying the distinction attempted to be drawn between usurpation by a total stranger and by a person privy in title. On principle I can find no sufficient ground for the distinction. The presentations of *Wynne*, *Smith*, *Holland*, and *Mylius* were all made without the concurrence or consent of, or any previous notice to, the trustees now represented by the Plaintiffs. The Plaintiffs' counsel, whose ingenious argument left no point untouched, relied on this circumstance, and contended that the exchange presentations ought not, as between the Plaintiffs and the Defendants, to be reckoned, because, as they urged, it was the duty of the Defendants to give the Plaintiffs notice before the presentations were made. But they were unable to produce any authority for the proposition that, as between persons entitled to present in turns, there exists any such duty to give notice of the vacancy. They relied on the case of a resignation and the bishop's duty to give notice to the patron before collating. But this case stands on its own footing, and does not supply an analogy which can be acted upon. It was said that there was no negligence because there was no knowledge. But, as I understand the term "negligence" as it occurs in Lord *Alvanley's* judgment and the other authorities cited at the Bar, it means merely omission to present, or in other words, missing the turn. In *Vin.* Abr. title Presentation (1), it is stated that "where one loses his turn by lapse, this shall stand for his turn; and at the next avoidance, the other shall have his turn again." The induction of the incumbent which follows on presentation,

(1) K. a, pl. 7.

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whether on an exchange or otherwise, is an open, notorious, and public act—notice, in fact, to the world, and of which the patron is bound to take cognizance at his own peril; after the expiration of the six months allowed by law for the *quare impedit*, the patron is bound and cannot disturb the incumbent. I have dealt with the main arguments presented for the Plaintiffs. As to the suggestion that some doctrine of estoppel or of equity applies, it is sufficient to say that in my opinion there is no room for the application of any such doctrine. It was said that natural justice required that where one had usurped the turn of another, the usurper ought to give up his next turn, or that the person against whom the usurpation was made, ought to be remitted to the usurper's next turn, or allowed to stand in the usurper's shoes. But I am not at liberty to apply any supposed principle of natural justice to a case of real property like an advowson, governed as it is by strict technical rules of law. The action is dismissed. Inasmuch, however, as the Defendants, or their predecessors, were not only usurpers, but the strength of their case depends on their usurpation, I consider that I may properly exercise my discretion by declining to give them any costs.

Solicitors: *O. C. T. Eagleton; Nisbet & Daw.*

W. C. D.

NORTH, J.
1894
June 15.

In re BASSETT.
BASSETT *v.* BASSETT.

[1894 B. 40.]

Practice—Leave to issue Attachment—Service of Notice of Motion—Defendant who has not Appeared—Rules of the Supreme Court, 1883, *Order* XLIV., *r.* 2; *Order* LII., *rr.* 3, 4; *Order* LXVII., *r.* 4.

On the 27th of April an order was made that the Defendant, who had not entered an appearance in the action, should, within fifteen days after service of the order, leave at the Chambers of the Judge certain accounts and statements. The order was served on the defendant personally on the 12th of May. The Defendant did not comply with the order, and on the 8th of June the Plaintiff gave notice of motion for leave to issue an attachment against him. The notice was not served on the Defendant, but was filed with the officer of the Court pursuant to rule 4 of Order LXVII. :—

Held, that, as the Plaintiff evidently knew where to find the Defendant, leave ought not to be given to issue an attachment unless notice of the motion was served on the Defendant.

MOTION by the Plaintiff, asking that she might be at liberty to issue a writ of attachment against the Defendant, for his contempt in not leaving at the Chambers of Mr. Justice *North* certain accounts and statements relating to the estate of *Dinah Bassett*, widow, deceased, pursuant to an order of the Court, dated the 27th of April, 1894.

The action was commenced by originating summons for the administration of the estate of *Dinah Bassett*, the Defendant being her executor. The Defendant did not enter an appearance to the summons. On the 26th of February, 1894, an order was made in Chambers for the administration of the estate, and it was ordered that certain accounts and inquiries should be taken and made. And the further consideration of the action was adjourned. On the 27th of April, 1894, on the application of the Plaintiff, an order was made that the Defendant should, on or before the 23rd of May, 1894, or within fifteen days after service of the order, leave at the Chambers of Mr. Justice *North* the accounts and statements in question. This order was served on the Defendant personally on the 12th of May, 1894. There

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was indorsed on the order a note that, if the Defendant should neglect to obey the order within the time therein named, he would be liable to attachment, and to process of contempt, for the purpose of compelling him to obey the order. The Defendant did not comply with the order, as was shewn by an affidavit made on the 14th of June, 1894, by a clerk of the Plaintiff's solicitors.

The notice of motion was dated the 8th of June. It was not served upon the Defendant, but was filed with the officer of the Court pursuant to Order LXVII., rule 4.

E. Clayton, for the Plaintiff:—

The Defendant not having appeared, it is sufficient to file the notice of motion. Personal service is not necessary: Order LXVII., rule 4; *In re Morris* (1); *In re Evans* (2). Rule 4 of Order LII. does not apply; it only means that a copy of any affidavit intended to be used shall be served with the notice of motion when service is necessary. In the present case service is not necessary.

The Defendant did not appear.

NORTH, J.:—

I decline to give leave to issue an attachment against a Defendant who has not had any notice of the application in a case in which the Applicant evidently knows how to find the Defendant. It may be very proper to give leave without service of the notice of motion in a case in which the Applicant does not know where to find the Defendant. In the present case I will not give the leave until the Defendant has been served with notice of the application. Copies must also be served on him, in accordance with Order LII., rule 4, of the affidavits which it is intended to use in support of the motion.

Solicitors: *T. A. Dennison & Co.*, agents for *C. Brady, Birmingham.*

(1) 44 Ch. D. 151. (2) [1893] 1 Ch. 252.

W. L. C.

In re QUEENSLAND LAND AND COAL COMPANY. DAVIS *v.* MARTIN.

NORTH, J.
1894
June 20, 21.

[1889 Q. 2774.]

Company—Debentures in Blank—Equitable Security.

A limited company, in pursuance of a contract to issue debentures as security for a loan, sealed and delivered to the lenders debentures in blank as to the names of the obligees. In an action by a legal debenture-holder to administer the trusts of a covering deed made to secure the debentures, the lenders were allowed the benefit of the trusts *pari passu* with the other debenture-holders up to the amounts of their debt.

THE *Queensland Land and Coal Company, Limited,* was registered on the 1st of July, 1881. In June, 1882, an indenture made between the *Queensland Land and Coal Company,* of the one part, and trustees for proposed debenture-holders of the other part, was executed, by which land and coal mines in *Queensland* were conveyed to the trustees for the purpose of securing the repayment of an issue of debentures of the company to the amount of £170,000 to rank *pari passu,* the debentures to be in the form provided in a schedule to the deed. In October, 1883, debentures to the amount of £64,000 had been issued in conformity with the covering deed. At a meeting of the directors of the *Queensland Land and Coal Company,* held on the 23rd of October, 1883, an arrangement for the borrowing of £5000 from the *Queensland National Bank* was sanctioned, and it was resolved to give the bank a letter, already written, undertaking to hand them debentures to the amount of £20,000 as collateral security: and it was also resolved that the seal of the company should be affixed to the debentures to the amount of £20,000, to be handed to the bank as collateral security The seal of the company was affixed to debentures to the amount of £20,000: but the names of the persons to whom the debentures were issued were left blank. The incomplete debentures were handed to the bank, together with the letter of charge, and £5000 was advanced by the bank to the *Queensland Land and Coal Company.* In the following month of November, 1883, a further loan of £1000

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was made by the bank to the *Queensland Land and Coal Company* on similar terms: and similar incomplete debentures for £4000 were handed to the bank.

The *Queensland Land and Coal Company, Limited*, was dissolved on the 14th of September, 1888, under the provisions of sect. 7, sub-sect. 4, of the *Companies Act*, 1880.

This was an action commenced by a debenture-holder against the trustees of the covering deed of 1882 by originating summons for the execution of the trusts of the deed. The action now came on for further consideration.

The *Queensland National Bank* held as collateral security, under the arrangements made in October and November, 1883, the debentures issued as above mentioned, sealed by the company, and in due form, except that they were still in blank as to the name of the obligee. There was due to them the sum of £6054 6*s.* 4*d.* and interest. There was a large sum of arrears of unpaid interest, and the funds subject to the trusts of the covering deed were insufficient to pay the debentures in full. The only question before the Court was whether the *Queensland National Bank* were entitled to participate with the other debenture-holders to any and what extent in the distribution of the funds subject to the trusts of the covering deed.

Cozens-Hardy, Q.C., and *George F. Hart*, for the Plaintiff:—

The debentures held by the *Queensland National Bank* are in themselves mere waste paper, void as legal instruments, because at the time of execution the name of the obligee was in blank: *Hibblewhite* v. *M'Morine* (1); *Société Générale de Paris* v. *Walker* (2).

It may be that, as between themselves and the *Queensland Land and Coal Company*, if it existed, the claimants would have a good equity; but as against the holders of legal debentures they have no such right: *Mowatt* v. *Castle Steel and Iron Works Company* (3); *In re Regent's Canal Ironworks Company* (4); *In re Strand Music Hall Company* (5).

(1) 6 M. & W. 200.
(2) 11 App. Cas. 20.
(3) 34 Ch. D. 58.
(4) 3 Ch. D. 43.
(5) 3 D. J. & S. 147; 35 Beav. 153.

If the *Queensland National Bank* can be allowed their claim (legal or equitable) to any extent, they can only share in dividends in proportion to the debt actually due to them.

The claim being at the utmost an equitable claim, it can only be allowed on terms of their doing equity.

H. S. Scrivener, and *R. M. Pattisson*, for debenture-holders in the same interest.

Eve, for the trustees of the covering deed.

Swinfen Eady, Q.C., and *Alexander Young*, for the *Queensland National Bank* :—

The debentures are good legal debentures: *Levy* v. *Abercorris Slate and Slab Company* (1); *Cole* v. *Parkin* (2).

Assuming the debentures to be void as legal instruments, the bank, in virtue of their contract and the possession of the equitable debentures, are entitled, as against the holders of legal debentures who have had the benefit of the contract, to share in dividends in proportion to the amount of the debentures they hold up to the amount of their debt: *In re Strand Music Hall Company* (3); *Ross* v. *Army and Navy Hotel Company* (4); *In re Regent's Canal Ironworks Company* (5).

Cozens-Hardy, in reply.

NORTH, J. held that the debentures in question were void as legal instruments, referring to *Sheppard's Touchstone* (6); *Weeks* v. *Maillardet* (7); *Enthoven* v. *Hoyle* (8), and continued :—

The next question is, What is the position of the *Queensland National Bank* in Equity? Subject to objections I will deal with by-and-bye, I think they have a good equitable claim, and the cases cited are exactly in point. Assuming that there is a clear definite contract to have debentures issued to them in respect of the loan for the amount mentioned, it seems to me

(1) 37 Ch. D. 260.
(2) 12 East, 471.
(3) 3 D. J. & S. 147; 35 Beav. 153.
(4) 34 Ch. D. 43.
(5) 3 Ch. D. 43.
(6) Page 52.
(7) 14 East, 568.
(8) 13 C. B. 373.

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that they have as good a claim as any debentures could give them, except that their claim is equitable and not legal.

In my opinion, therefore, they are equitable holders of debentures, just as they would have been legal holders if the names of obligees had been inserted before the debentures were executed by the company; and I think *In re Strand Music Hall Company* (1) and the other cases cited by Mr. *Swinfen Eady* are exactly in point.

[His Lordship overruled arguments raised on behalf of the Plaintiff on the *Statute of Limitations* and the *Statute of Frauds*, and continued:—]

Another point put by Mr. *Hardy* was that, as he argued, the case was not to be considered as between the *Queensland Land and Coal Company* and the *Queensland National Bank* only, but between the bank and the holders of legal debentures, against whom there is not the same equity. But the *Queensland National Bank* are in Equity debenture-holders entitled to the rights of debenture-holders, and no such distinction was drawn in the cases cited. I think the case of *In re Strand Music Hall Company* is exactly in point; for though it is left in the report in some obscurity as to the exact position of the persons proving as compared with others ranking equally with them, I think there must have been other persons holding debentures of the same rank; because a statement in the text shews that there had been other debentures of the same issue taken up. I do not see why the bank here should not stand in the same position when once you have got the fact that they have equitable debentures as good in Equity as legal debentures. One further point was raised. It was said that terms ought to be imposed on the bank to put them in the same position as to dividends as the other debenture-holders. I do not see my way to impose any terms, for this reason: I have to find out what the rights of the bank are. Either they have a good claim or they have not; if they have not, they ought not to be allowed anything; if they have, I do not see on what ground I can take away the rights they have contracted for, and which it was agreed they should have when this money was received from them and the security was

(1) 3 D. J. & S. 147; 35 Beav. 153.

given in return. I think there is a definite contract; and as soon as I find there is a definite contract which binds the parties, I must leave the contract as I find it.

Solicitors for Plaintiff: *Biggs, Roche & Co.*

Solicitors for debenture-holders: *Chappell, Griffith, & Broadbridge; Hores & Pattisson.*

Solicitors for trustees of the covering deed: *Hubbard, Son, & Eve.*

Solicitors for *Queensland National Bank*: *Stretton, Hilliard, Dale, & Newman.*

D. P.

BRINSDEN *v.* WILLIAMS.

[1893 B. 3256.]

Solicitor—Mortgage—Trustee de son tort.

Solicitors of a mortgagee trustee *held* not liable for the insufficiency of the security, though the mortgage money was paid through them.

THE Plaintiff in this action, *Louisa Brinsden*, widow, was, in the events which had happened, the sole beneficiary under a settlement made on the marriage of her father, *Charles Frederick Baxter*, in 1840. The action related to certain mortgage transactions, involving the loan of £2500 in two sums of £1500 and £1000, made by *Edward Baxter*, the then sole trustee of the settlement, and brother of *Charles Frederick Baxter*, in January, 1882. No new trustee was ever appointed.

Edward Baxter died in September, 1892. The Plaintiff was his sole executrix.

The Defendants were *Isaac Williams*, the mortgagor, and *Edward Henry Bartlett*, the surviving member of the firm of solicitors, *Ford, Lloyd, & Bartlett*, who acted as solicitors for both parties in the mortgage transactions.

The Plaintiff claimed mortgage accounts and personal judgment against the Defendant *Williams*, and against the Defendant *Bartlett* a declaration that he was liable to make good the sums of £1500 and £1000 and interest. Judgment had previously been given against the Defendant *Williams*. The action was now tried against the Defendant *Bartlett*.

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The mortgages in question were dated the 9th of January, 1882. One was a mortgage for £1500 on a freehold brickfield, the other for £1000 on two freehold houses. Both the mortgagor and the mortgagee were clients of Messrs. *Ford, Lloyd, & Bartlett*, by whom the mortgagor and mortgagee were introduced to one another. The Defendant *Bartlett* was the partner who took the most active part in the transaction so far as his firm acted in the matter. The mortgages were made by the desire of *Charles Frederick Baxter*, who took an active part with his brother in the negotiations which led up to the mortgages.

The Defendant *Williams* at that time was indebted to his bankers in a sum exceeding £2500; the bankers held the title-deeds relating to the brickfield and houses intended to be mortgaged. It was arranged between the borrower, the lender, and the borrower's bank that to carry out the mortgage £2500 lent should be paid to the bankers, who would give up their charge on the property, and hand over the deeds to the solicitors. On Saturday, the 7th of January, 1882, a cheque for £2500 (it did not appear who was the drawer) was given by *Baxter* to the Defendant *Bartlett*; he placed the cheque on the same day with his firm's bankers to the firm account. On his way to business on the morning of Monday, the 9th of January, 1882, he called at the mortgagor's bankers, and gave them a cheque on behalf of his firm for £2500, and received in exchange the title-deeds of the property intended to be mortgaged. The mortgages were executed on the 18th of January, dated the 9th of January, 1882. The Judge considered on the evidence that the mortgagee had acted entirely on his own responsibility in taking the mortgage, and not in any way on the advice of his solicitors as to the sufficiency of the security; and that the solicitors had taken care that the mortgagee was informed that the security might turn out to be an improper one for trust money.

Swinfen Eady, Q.C., and *A. àBeckett Terrell*, for the Plaintiff:—

The investment in the mortgage of the brickfield was one not proper for trust money: *Learoyd* v. *Whiteley* (1).

(1) 12 App. Cas. 727.

Messrs. *Ford, Lloyd, & Bartlett* so intermeddled in the transaction that they made themselves liable as trustees. The fact that the mortgage money passed through their hands imposed a duty on them to see that it was not improperly invested; for the breach of that duty they were liable, and the Defendant, their surviving partner, was now liable as a trustee: *Blyth* v. *Fladgate* (1); *Hardy* v. *Caley* (2).

Cozens-Hardy, Q.C., and *Davenport*, for the Defendant:—

The case of *Blyth* v. *Fladgate* has been misunderstood. In that case one member of a firm, acting as a solicitor in such a way that he had power to bind his partners, took upon himself the management of the trust; he paid money which was entrusted to the firm at a time when there were no actual trustees of the fund on an insufficient security, the sufficiency of which he took upon himself to advise upon. The Court held that he had constituted himself a trustee, and it was the duty of the firm of solicitors to see that the money in their hands was not improperly applied.

In this case the Defendants' firm never took on themselves to advise on the sufficiency of the security; the *Baxters* acted, in taking the security, entirely on their own responsibility. Messrs. *Ford, Lloyd, & Bartlett* merely acted as agents in the matter, and were accountable only to the trustee who employed them: *Lewin* on Trusts (3); *Myler* v. *Fitzpatrick* (4); *Maw* v. *Pearson* (5); *Morgan* v. *Stephens* (6); *Lee* v. *Sankey* (7); *Barnes* v. *Addy* (8); *In re Spencer* (9); *In re Blundell* (10); *In re Barney* (11).

The fact that the payment was made through them as agents to carry out a previously arranged transaction could cast no trustees' duty on them in respect of that transaction.

Neglect against the firm of solicitors, as solicitors, was not alleged, and any action on the ground of neglect would be barred by lapse of time.

(1) [1891] 1 Ch. 337.
(2) 33 Beav. 365.
(3) 9th Ed. p. 723.
(4) 6 Madd. 360.
(5) 28 Beav. 196.
(6) 3 Giff. 226.
(7) Law Rep. 15 Eq. 204.
(8) Ibid. 9 Ch. 244.
(9) 51 L. J. (Ch.) 271.
(10) 40 Ch. D. 370.
(11) [1892] 2 Ch. 265.

NORTH, J. *Swinfen Eady*, in reply.

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NORTH, J:—

There are two questions in this case: first, whether the investment which was made was a proper one or not; and, secondly, whether, if it was not, Mr. *Bartlett* is responsible for it. As regards the first point, I do not think it necessary to decide it, because I am prepared to assume that there was a breach of trust.

[His Lordship having referred to the cases of *Learoyd* v. *Whiteley* (1), *Stickney* v. *Sewell* (2), and *Budge* v. *Gummow* (3) in reference to whether a mortgage of a brickfield was a proper investment for trustees, continued:—]

There is only one other case that I wish to refer to, which is a recent Scotch case in the House of Lords, and, although there is one important difference between that case and the present, still it is one, I think, which throws some light upon the way in which questions of this sort are viewed by the Courts. I do not say it is a clear authority applicable to the case. I refer to the case of *Rae* v. *Meek* (4). It is a Scotch case, but it is one in which the English authorities, particularly *Learoyd* v. *Whiteley*, were cited; and I do not think that the law of *Scotland* is different in that respect from the law of *England*. In that case there were several defendants and several trustees of Mr. and Mrs. *Rae's* settlement; and among the defendants, who were the respondents on the appeal, were *John Meek*, one of the trustees under the settlement, and the firm of *Hotson & Howie*, who were law agents acting for the trustees at the date of the transaction in question; and the surviving partner, *Robert Howie*, and the representatives of the deceased partner were also respondents. The trustees were considering the investment of a sum of £4750, and a meeting took place at which it was resolved to look for heritable securities of adequate value, and Mr. *Hotson*, the law agent, was to be on the look-out for such, and to report to the trustees any proposal he might receive. Then, subsequently, certain negotiations took place with respect to the

(1) 12 App. Cas. 727.
(2) 1 My. & Cr. 8, 14.
(3) Law Rep. 7 Ch. 719.
(4) 14 App. Cas. 558.

loan of the money on property in *Glasgow* on which there were unfinished buildings, which the Court held to be an insufficient security. I need not go into the details of the case in respect of that. It was not a proper trust investment. Then the report states, that on the 5th of May, 1874, a meeting of the trustees was held in the law agent's office, at which Mr. and Mrs. *Rae* and *John Meek* were present. I take it that the law agents were there, or one of them, because it was held at their office. Then the minute laid before the meeting stated that there were several heritable properties on which loans were wanted, and, after considering them and comparing them, the trustees resolved to make a loan of £4500 to Mr. *William Anderson*, one of the applicants, on the security of the building mentioned, which was valued by an architect at £6500, provided always Mr. *Hotson* should be satisfied with the title. He was the law agent. Those valuations were obtained; and the action was brought saying that the money was lost through the gross negligence and want of skill of Messrs. *Hotson & Howie*. The advance was made in 1874, and the action was brought in 1886; and the question to be decided was, whether the trustees and the law agent were jointly and severally liable to make good this money and interest. The judgment of the House of Lords, which was given by Lord *Herschell*, and in which the other learned Lords concurred without giving reasons of their own, contains this passage (1): "My Lords, at the conclusion of the argument of the learned counsel for the appellants, all your Lordships were of opinion that they had failed to shew any ground for their action against the law agents. I share the difficulty which was felt by the Lord Ordinary. I cannot see how the law advisers could in any view be held liable to restore to the trust fund the money lost, which was the claim against the other defender. If an action be maintainable against them at all, it could only be to compel payment of such damages as the appellants have sustained by reason of their failure of duty. And, considering the contingent nature of the appellants' interest in the fund" (those were the *cestuis que trust*), "it is obvious that this must be something very different from the

(1) 14 App. Cas. 568.

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amount of the loss to the estate. Liability as against the defenders, with whose case I am now dealing, could, in my opinion, only be established by proof that they were employed to give advice either by the appellants or by some person on their behalf, and that, having undertaken this employment, they neglected their duty. Now, they certainly were not employed by the appellants, nor do I think they were employed on their behalf. The alleged duty, if it existed at all, was to the trustees, and not to the beneficiaries. If there has been a breach of it, the trustees and not the beneficiaries are the parties to sue. There may be cases where, if trustees failed to call to account those who were under liability in respect of acts injurious to the trust estate, the beneficiaries might compel them to do so, or even enforce the right themselves. But no such question is raised by the averments in the present action. And, further, I think it right to say that in my judgment the evidence does not establish that the law agents were employed to advise the trustees as to the sufficiency of the security, or that they acted on any such advice. It seems to me, therefore, that the case against these defenders entirely fails, and that the appeal as against them ought to be dismissed." It is true that there is one very important difference between that case and the present, which Mr. *Swinfen Eady* relies upon, and which must be dealt with separately, namely, that it does not appear that in that case the law agents actually handled the funds, which is said to be the case here. Those were the facts with which the House of Lords had to deal in that case, and they held there was not, in their opinion, any liability. [His Lordship examined the evidence, and proceeded :—]

This claim is now made against Mr. *Bartlett*, the surviving member of the solicitors' firm, to make him responsible; and the question is, whether he is so responsible. Leaving out of consideration for the moment what was done with respect to the cheque, it seems to me that his firm filled precisely the position that the law agents did in the case of *Rae* v. *Meek* (1). They were not the persons who were advising about the security at all. They did see that the parties either knew or were told that

(1) 14 App. Cas. 558.

it would not or might not be a proper investment of trust money; but the correspondence satisfies me that the trustee chose to act on that for himself, and did not consult his solicitors about it. The solicitors were in rather a peculiar position. They initiated this matter on behalf of their client, Mr. *Williams*, and when Mr. *Baxter* entertained the proposal, he also being a client of the same solicitors, the solicitors were in the position of standing between the two. The *Baxters* do not seem to have employed any separate solicitors of their own in any way, and they were content to leave the matter with Mr. *Bartlett's* firm. They knew, no doubt, that the costs of everything that was necessary to be done would be paid by the mortgagor, and, in point of fact, that was one of the matters mentioned expressly in the terms settled in their negotiations. That being so, Mr. *Bartlett's* firm being their proper solicitors in other matters, they were content to leave the matter in the hands of that firm of solicitors to do all that was necessary as between mortgagor and mortgagee; but, in my opinion, they acted on their own responsibility in considering whether the mortgage was one which ought or ought not to be made.

[After saying that he did not see that the solicitors had been guilty of neglect, his Lordship continued:—]

But it is quite clear that, whatever neglect there were, if any, there can be no remedy in respect of it by reason of the *Statute of Limitations*, and therefore any question of neglect is of no importance. But the fact remains that, in my opinion, these persons did not recommend the security at all, but merely acted as solicitors in respect of a security between two clients of theirs, the sufficiency of which the persons proposing to lend the money considered for themselves.

If the matter stood there, I should have thought it was clear that the solicitor could not be liable in any way. But then there remains a transaction which requires separate consideration: it is said the solicitors are liable because they did actually receive the trust money. I do not think they did; they were directed to arrange with the bank, the prior mortgagee, to obtain the deeds from them, paying them with money with which they were provided by the trustee for that purpose. They were anxious to take

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up the deeds from the bank. They went there for that purpose, and, instead of cashing the cheque or waiting till the cheque which had been sent to them had been cashed, or indorsing the cheque over to the bank, they, in fact, said: "If you will hand us the deeds we will personally pay you the money, and here is our cheque for the amount." And at half-past nine on the Monday morning the firm did undertake the obligation of making themselves personally responsible for the money in return for these deeds, they at the time not having received any money from the *Baxter* trust, although, no doubt, they had received the cheque two days before, namely, on the Saturday. It had not been cleared, of course, at half-past nine on Monday morning. That being so, they gave their own obligation in respect of this loan to the bank, and, in my opinion, the trust money did not pass through their hands at all. But I do not rest my judgment on that; because, in my opinion, if, at two o'clock, or, say, at half-past two on Saturday, after the bank had been closed, they had received £2500 in bank notes from Mr. *Baxter*, and had kept it until the following Monday morning, and had then called at the *Bayswater* branch and handed that £2500 over to the manager of the mortgagee bank, they would not have incurred any liability by reason of their having had at that time this sum of cash forming part of the trust funds in their possession. What they did in fact was that, instead of keeping it in their possession for that time, they facilitated matters by paying it into their bank and drawing a cheque on their bank. That could not make them more liable than if they kept it in their own hands instead of paying it into the bank. Under those circumstances, the money was supplied by the trustee to the solicitors, as his agents, for the purpose of supplying such agents with the means necessary to obtain the deeds from the bank. It was so applied by the solicitors; and, in my opinion, assuming this was a part of a transaction by the trustee in which he was advancing trust money upon an improper security, this amount of intermeddling with it did not make the solicitors employed the agents, except for the purpose of receiving the money and paying it to the mortgagee bank, and getting the deeds. It did not implicate them in a breach of trust, and did not make them persons who

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were in any sense assuming the position or duty of trustees in such a way as to be liable as trustees or as constructive trustees. In my opinion, Mr. *Bartlett's* firm were merely carrying out the directions of their principal in the matter, and are not, therefore, personally liable in respect of any breach of trust.

Under those circumstances, the action against Mr. *Bartlett* fails altogether, and must be dismissed.

Solicitor for Plaintiff: *Fladgates.*

Solicitors for Defendant *Bartlett: Ford, Lloyd, Bartlett, & Michelmore.*

D. P.

Dictum of NORTH, J., at pp. 201, 202, *applied. Re* DE BEAUJEU. [1949] 1 All E.R. 439. — *Considered. Re* DE BEAUJEU'S APPN. [1949] 1 Ch. 230

In re MARTINDALE.

NORTH, J.
1894
June 15, 22, 23; *Aug.* 9.

[1894 M. 843.]

Contempt of Court—Committal—Ward of Court—Proceedings in Camerâ—Publication in Newspaper—Frivolous Application for Committal—Costs.

An injunction having been granted by *North*, J., restraining a man named *Hueffer* from holding communication with a female ward of Court, further proceedings in the matter took place before the Judge *in camerâ*, *Hueffer* being present. It was then stated that he and the ward had been secretly married several weeks previously. The further hearing was adjourned. On the afternoon of the same day there was published in the *Star* newspaper a paragraph which stated that on that day a rarely romantic story had been unrolled before *North*, J., who sat in private. The name of the lady was given, and it was stated that the object of the proceedings was to prevent her perpetrating matrimony with *Hueffer*. Allusion was then made to some books which *Hueffer* had written, and it was added that the proceedings might have been comparatively tame, but for the fact that it turned out that the lady had married *Hueffer* some three weeks ago, and that the case stood adjourned. This paragraph had been furnished to the *Star* by a contributor named *Perris*, a friend of *Hueffer*, the information having been supplied to him by *Hueffer*. The next day a similar paragraph appeared in a paper called *Morning*, but it was not stated that the proceedings were in private. The paragraph in *Morning* was afterwards copied into two other newspapers. The next friend of the ward moved to commit for contempt of Court the publishers of the four newspapers, *Hueffer*, and *Perris*. The publisher of *Morning* swore that he did not know that the proceedings were not in open Court. Apologies were tendered if the Court should be of opinion that a contempt had been committed:—

Held, that the publication in the *Star* was a contempt, but that it was

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not a serious one; and the Court, being satisfied that it was an unintentional one, held that justice would be met by ordering the publisher of the *Star* and *Hueffer* respectively to pay the costs of the respective motions to commit them:

But *held*, that the motions to commit *Perris* and the publishers of the other newspapers were vexatious and an abuse of the process of the Court, and that they must be refused with costs.

MOTIONS by the next friend of an infant female ward of Court to commit the publishers of four newspapers, called the *Star*, *Morning*, the *Pall Mall Gazette*, and the *People*, for contempt of Court, in publishing in their respective newspapers statements relating to some proceedings in the matter of the ward which had taken place before the Judge *in camerâ*.

There were also motions to commit for contempt one *Perris*, who had contributed the paragraph which had been published in the *Star*, and one *Hueffer*, who had secretly married the ward, and who had supplied to *Perris* the information which had enabled him to write the paragraph.

On the 1st of June, 1894, Mr. Justice *North*, on the application of the father and next friend of the ward, *Elsie Martindale*, granted an injunction restraining *Hueffer* from holding communication with her. It was not known then that he had married her. The order also required *Hueffer* to attend personally before the Judge on the 6th of June. *Hueffer* accordingly attended on that day, when the Judge heard the matter in his private room, *Hueffer* and the other parties, and their counsel and solicitors, being present. It was then stated that *Hueffer* had married the ward two or three weeks previously. The further hearing of the case was adjourned.

On the afternoon of the same day there appeared in the *Star* the following paragraph:—

"A Poet's Love Affair.

"A Chancery Court Chapter of 'The Queen who Flew.'

"In Chancery Court No. 2 to-day a rarely romantic story was unrolled before Mr. Justice *North*, who sat in private to hear the action innocently set down as *In re Martindale*. The action was one to forbid a Miss *Martindale*, said to be a ward in Chancery, from perpetrating matrimony, the danger arising in con-

nexion with the attentions of a young poet and novelist who has already achieved a certain measure of distinction by 'The Shifting of the Fire' and other of his books—to wit, Mr. *Ford H. Madox Hueffer*, of *Brook Green, W.* Mr. *Hueffer* is well known as son of the late Dr. *Hueffer*, the once champion of *Wagner* in *England* and musical critic of the *Times*, and as grandson of Mr. *Ford Madox Brown*. His intimate connexion with the Pre-Raphaelite Brotherhood is also marked by the fact that his just-published novel, 'The Queen who Flew' (significant title) is illustrated by Sir *Edward Burne-Jones*. The proceedings to-day might have been comparatively tame but for the fact that it turned out that there no longer was any Miss *Martindale* to protect. That lady became Mrs. *Madox Hueffer* some three weeks ago. The case stands adjourned for the present."

On the morning of the 7th of June the following paragraph appeared in the *Morning* newspaper:—

"A Young Novelist's Romance.

"A romance which has excited much interest in certain literary and artistic circles in *London* became more widely known yesterday as forming the subject of an action in Chancery Court No. 2, before Mr. Justice *North*. The cause was *In re Martindale*, and the action taken to prevent the marriage of a Miss *Martindale*, a minor and a ward in Chancery. When the case came on it was found out that there was no longer a Miss *Martindale* to be protected, and an adjournment had to be made. In fact, the lady had three weeks before been married to the lover whom it was sought to bar—Mr. *Ford Madox Hueffer*. Mr. *Hueffer* has already made a certain mark in fiction. He has also published a book of verse, and his last book, 'The Queen who Flew,' is illustrated by Sir *E. Burne-Jones*. Mr. *Hueffer* is son of the late Dr. *Hueffer*, the champion of *Wagner* and the well-known musical critic, and grandson of the late *Ford Madox Brown*."

The paragraph in the *Morning* was copied into the *Pall Mall Gazette* of the same day, and into the *People* of the 8th of June.

The paragraph in the *Pall Mall Gazette* stated that the proceedings were in open Court.

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It appeared that the paragraph in the *Star* had been written by *Perris*, a contributor to that journal, and a friend of *Hueffer*, upon information supplied to him by *Hueffer*.

An affidavit in defence on behalf of the publisher of *Morning* stated that the paragraph inserted in that newspaper came from a correspondent in the usual way, but did not divulge his name.

The publisher of *Morning* swore that he did not know that the proceedings were not in open Court.

June 15. *Swinfen Eady*, Q.C., and *George Henderson*, for the motion against the publisher of the *Star*:—

The paragraph complained of professes to be an account of proceedings which the Court had decided should take place in private. The publication of an account of what then took place is a contempt of Court, and none the less because it is an inaccurate account. The case is a gross one, relating as it does to a ward of Court, and holding up the Court to ridicule.

Boome, for the publisher of the *Star*:—

The paragraph discloses nothing but what was already known, and what was true, and it was for the advantage of the parties that it should be known. If there is a technical contempt it is a harmless one, of which the Court will not take any notice: *Hunt* v. *Clarke* (1).

Swinfen Eady, in reply.

NORTH, J., referred to *Lawrence* v. *Ambery* (2), and reserved his judgment.

June 22. *Swinfen Eady*, Q.C., and *George Henderson*, for the other motions:—

The conduct of all the Respondents amounts to a contempt in law. If any of the Respondents were, as they say, ignorant that the proceedings were in private, that is not of itself a sufficient excuse: *Herbert's Case* (3); *Nicholson* v. *Squire* (4).

(1) 37 W. R. 724.
(2) 91 L. T. Journ. 230.
(3) 3 P. Wms. 116.
(4) 16 Ves. 259.

S. Hall, Q.C., and *George Lawrence*, for the publisher of *Morning*; and

S. Hall, Q.C., and *Vernon R. Smith*, for the publisher of the *Pall Mall Gazette*:—

The article in *Morning* was published without knowledge that it referred to anything not heard in open Court, and it was harmless. It neither (1.) brought the Court into contempt; nor (2.) tended to obstruct the course of justice; nor (3.) injured or interfered with the infant. The same observations apply to the paragraph in the *Pall Mall Gazette*, which was copied from that in *Morning*. The Court will not encourage a frivolous application to commit for a merely technical contempt: *Plating Company* v. *Farquharson* (1).

Butcher, for the publisher of the *People*:—

No contempt has been committed. It is not a contempt to publish the mere result of proceedings held in private: *Lawrence* v. *Ambery* (2).

Boome, for *Perris*, adopted a similar argument.

June 23. *Job Bradford*, for *Hueffer* and his wife:—

After the marriage the wife has a right to say that her name shall not be used in an application to commit her husband without her consent, which she has not given: *In re Potter* (3); *In re Sampson and Wall* (4). The wife desired that the fact of her marriage should be advertised as soon as possible, because it had been said that she had been living with her husband without marriage. It was for her advantage that the fact of the marriage should be made known. She urged her husband to do this, and this was the reason for the publication. In the cause paper there appeared the title *In re Martindale*, and this amounted to a representation that she was still unmarried. The object of a hearing in private is the protection and benefit of the ward. There was really no disclosure of anything which ought to have

(1) 17 Ch. D. 49.
(2) 91 L. T. Journ. 230.
(3) Law Rep. 7 Eq. 484.
(4) 25 Ch. D. 482.

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been kept secret; nothing was disclosed with reference to the proceedings in private, except the result. The rest of the paragraph only states facts outside the proceedings which were common property. If the husband has committed any contempt he desires to apologise to the Court; he had no intention of disclosing anything prejudicial to his wife.

Swinfen Eady, in reply:—

It is argued that it was not a contempt to publish facts ascertained *aliunde*, although they were stated to the Court in private. That is a fallacy; the contempt consists in publishing a report of proceedings which the Judge has directed to be in private. The very object of such a direction is to prevent publication. If the publisher of one newspaper copies from another he must take the risk of so doing. The publisher of *Morning* has not chosen to give the name of the writer of the paragraph in that paper, but the language shews that it must have come from the same source as the paragraph in the *Star*. As to *Perris*, he was told that the proceedings were in private, and, with that knowledge, took part in publishing that which the Court had directed to be in private. Moreover, the tone of the paragraph in the *Star* is offensive. As to *Hueffer*, there is no excuse for him. He and his wife deliberately kept their marriage secret for three weeks. The jurisdiction of the Court to hear in private cases relating to wards of Court is an ancient one, and it is of the highest importance that it should be maintained to the fullest extent. It was thought right to bring before the Court the publishers of all the newspapers which had published a paragraph relating to these proceedings. At the time when the notices of motion were given we did not know how the publishers had obtained the information.

1894. Aug. 9. NORTH, J.:—

I have now to deal with six motions for committal for contempt of Court. A very short statement of the facts will suffice. The parents of a young lady having thought fit to forbid communications between her and the Respondent *Hueffer*, she left her home suddenly. Having reasons for believing that *Hueffer*

was privy to this, the father's solicitors informed him by letter on the following day that the young lady had been made a ward of Court, and on the same day he acknowledged in writing the receipt of that letter. The statement that she had been made a ward was not accurate; though proceedings had then been commenced for the purpose, she did not actually become a ward until the 11th of April. The matter was not brought to my notice until the 1st of June, when I made an order restraining all communications between the young lady and *Hueffer*, and requiring him to attend personally before me in Court on the 6th of June. He did so. I may add that, to avoid the inconvenience of clearing the Court and turning the audience into the adjoining passage, I took the parties concerned into my private room; but this was precisely the same thing as hearing them in this Court after the public had left. On that occasion an affidavit by *Hueffer* was produced in which he stated that he did not know, and had no reason to believe, that the young lady was a ward of Court—the falsity of which assertion is proved by his letter above mentioned. His solicitor also said that the parties had been married two or three weeks before; and I stated that if proper evidence of the marriage was produced the operation of my order would be stayed. The certificate, when produced, shewed that the lady had been represented by *Hueffer* to be over twenty-one years of age; but, when the matter came before me again on the 9th, being satisfied that the false statements made by *Hueffer* to the registrar did not affect the validity of the marriage, although *Hueffer* had laid himself open to criminal proceedings under more than one head, I stayed the operation of the order. At the same time I declined to entertain any application to commit him for contempt, considering that if he was to suffer imprisonment it had better be by the sentence of a criminal Court in the proceedings to which he had exposed himself.

In the meantime, on the evening of the 6th of June, the paragraph which is the subject of the motions against *Hueffer* and *Perris*, and *Jones*, the publisher of the *Star* newspaper, was published in the *Star*. The material parts of the paragraph may be condensed to this, that on the day in question a rarely

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romantic story was unrolled before a Judge in Chancery, sitting in private, with reference to a female ward; which proceedings might have been comparatively tame, but for the fact that it turned out that the lady had been married to *Hueffer* three weeks before.

It was contended before me that the publication of this paragraph did not interfere with or tend to obstruct the course of justice. In this I agree. But this does not conclude the question whether it was a contempt or not. Articles have often been held to be in contempt of Court on the ground above mentioned, because published while litigation was pending, which would not have been such if only published after the litigation had been closed. But there may be, and are, publications which amount to contempts of Court, although they do not interfere with the course of justice, and have been committed when all proceedings are at an end—for instance, it would be idle to suppose that matters occurring with respect to a ward, which could not be published without contempt while the ward was an infant, could be published with impunity so soon as the ward had attained the age of twenty-one years.

It was also with great energy contended before me that all proceedings in a Court of justice ought to be public, and that there could not be any contempt in publishing what took place in Court; but in that I do not agree. The general rule is an excellent one, that legal proceedings should be in public; and if it were departed from the great weight which legal decisions carry with them in this country would be deservedly diminished. But to this rule certain exceptions are proper and necessary. One ground of exception is, if a public hearing would have the effect of disclosing what it is the whole object of the action to keep concealed, as in *Andrew* v. *Raeburn* (1) and *Mellor* v. *Thompson* (2); or of making known to the world a secret process, as in *Badische Anilin und Soda Fabrik* v. *Levinstein* (3). The hearing in private wholly or in part of cases in which public decency and morality require it to be done are also familiar, not only in the Divorce Courts, but also in the ordinary criminal and civil

(1) Law Rep. 9 Ch. 522. (2) 31 Ch. D. 55.
(3) 24 Ch. D. 156.

Courts, an instance of the latter being *Malan* v. *Young* (1). So also cases relating to lunatics are constantly heard in private; and cases as to wards—see *Ogle* v. *Brandling* (2)—in order that the lunatic or ward may not be prejudiced; and I cannot conceive a clearer contempt of Court than that a party concerned, or any person, should proceed forthwith to make known to the world the very matter which the Court had deliberately, in the exercise of its discretion, decided ought not to be published. It was said that the case of *Lawrence* v. *Ambery*, only to be found in the *Law Times Journal* (3), was a decision to the contrary. In that case proceedings for a divorce on the ground of nullity had been heard *in camerâ*, and a newspaper published the result, viz., that a decree for dissolution had been pronounced. It was decided that that publication was not a contempt, as, of course, it was not, any more than the publication of the marriage, in the present case, in the marriage column of the *Times*. But that case, if the very meagre report of it can be trusted, negatives the conclusion sought to be drawn from it; for, as I read it, if what had been published had been any part of what transpired when the Court was sitting *in camerâ*, the result would have been different.

In the present case I do not believe that any contempt of Court was intended, though this in itself would be no excuse for contempt actually committed. The paragraph inserted in the *Star* was so inserted without premeditation, having been concocted and handed in by *Hueffer* and his friend *Perris* merely as an advertisement for the former. Its vulgarity and bad taste are enhanced by the references to the Court of Chancery, and the sitting being in private—references obviously made, without any regard to the credit of the lady, for the purpose of attracting the attention of readers to a puff which, if not thus embellished, would have been passed by unnoticed. The paragraph, so far as I have quoted it above, was intended to appear to be and would be understood as a concise statement of what took place in my private room; and the disclosure is held out as an inducement to the public to read the whole paragraph.

(1) 6 Times L. R. 38. (2) 2 Russ. & My. 688.
(3) 91 L. T. Journ. 230.

NORTH, J. 1894 *In re* MARTINDALE.

It was said that, as the statement that the marriage had taken place was quite true, it could not be a contempt to state that; but, if the question of contempt depended upon the truth or untruth of the matter published, it would result in this—that there would be no contempt in an accurate disclosure of what passed *in camerâ*, although there would be if the account was a fictitious one, which is absurd. If the element of untruth were necessary, it would be found here in the statement that a rarely romantic story was unrolled. The story was a sad and very commonplace one; and on the day referred to it was not opened or gone into at all. But, as I have already said, there was no contempt in announcing the fact that the ward had become the wife of *Hueffer*; the contempt was in purporting to give the public information, though meagre, of what the Judge had decided ought not to be disclosed, by determining to hear the case in private and excluding the public. I do not regard the contempt as a serious one; at the same time, it was not mitigated by the line of defence which counsel adopted, the boldness of which cannot be appreciated by any one who did not hear it. At the same time, however, a proper apology was expressed if the Court should be of opinion that a contempt had been committed. Looking at all the circumstances, I think that justice will be met by ordering the publisher of the *Star* to pay the costs of the motion to commit him. The Respondent *Hueffer*, who went from the Court to his journalist friend and instigated him to write the paragraph in question and procure its insertion in the *Star*, is equally responsible for the publication of the paragraph, and he also must pay the costs of the motion against him.

With regard to the other motions, I am much surprised that they have been made at all. I consider them vexatious and an abuse of the process of the Court. In *Plating Company* v. *Farquharson* (1), the Court pointed out that motions to commit where there was no real ground for committing the party were mere waste of time and ought to be discouraged. See also the observations of the Court of Appeal in *Hunt* v. *Clarke* (2), to the same effect. I should certainly not hesitate to commit

(1) 17 Ch. D. 49. (2) 37 W. R. 724.

where a real ground for committal was shewn, as in the case of a deliberate contempt; but these four motions seem to me puerile. As regards *Perris*, the composer of the paragraph in question, I do not suggest for a moment that the part he has taken in the transaction might not have been sufficient to render him liable to committal, if the contempt had been a flagrant one. But I think that if action was necessary, the proceeding against the *Star* and *Hueffer* would have answered every purpose; and that it was not only unnecessary but vexatious to proceed against the writer. I therefore dismiss that motion with costs.

The other three motions were against Mr. *Hosker*, the publisher of a paper called *Morning*; Mr. *Hunt*, the publisher of the *Pall Mall Gazette*; and Mr. *Gray*, the publisher of a paper called the *People*. The article in *Morning* of the 7th of June does not shew, and Mr. *Hosker* swears that he did not know, that the proceedings referred to were not in open Court; the article in the *Pall Mall Gazette* of the same day states on its face that it was; and that in the *People* of the 10th of June also was simply copied from that in *Morning*, and they were inserted without any knowledge or means of knowledge that the proceedings had been in private. I dismiss these three motions with costs. I have hesitated somewhat about the costs, because of the line of defence adopted on behalf of the Respondents; but, disapproving as I do of these motions having been launched at all, I think the costs should follow the result. I may add this, however, for the guidance of these Respondents in future, that, if they really had done what their counsel asserted their right to do with impunity, I should certainly have committed every one of them.

Solicitors: *Wilson & Son; Harrison & Davies; Sutton, Ommanney, & Rendall; Rollit & Sons; Lewis & Lewis; Shaen, Roscoe & Co.*

W. L. C.

STIRLING, J.
1894
June 16.

In re JOHNSTON.
MILLS *v.* JOHNSTON.

[1891 J. 1009.]

Will—Construction—Trust for Benefit and Advancement of Legatee—Discretion given to Trustee as to Application—Legatee absolutely entitled.

A testator gave to trustees all his property upon certain trusts, and directed that certain specified sums of money should be invested for the benefit of his four sons on their attaining twenty-one, such sums to be applied as the trustees in their discretion might think fit; and he further directed that the sums specified should be very judiciously invested, as they were intended specially for the advancement in life of the respective recipients:—

Held, that the sons were absolutely entitled to the legacies, freed from the exercise of any discretion on the part of the trustees.

Adjourned summons.

The testator, *James Johnston*, who died on the 14th of April, 1891, by his will, dated the 23rd of June, 1890, gave to the Plaintiff *Robert Mills*, the executor and trustee of his will, all his estate and effects whatsoever and wheresoever upon certain trusts therein mentioned, and he directed that his sons, the Defendants *James Annandale* and *Charles Spread Johnston*, should on their respectively attaining twenty-one become executors and trustees of his will. That was by a codicil postponed to their attaining the age of twenty-five. The will contained (*inter alia*) the following provisions: "I desire that £1200 shall be invested for the benefit and advantage of my eldest son *James Annandale* on his attaining the age of twenty-one years, or as soon after as practicable, such sum to be applied to his professional or other advancement at the discretion and judgment of *Robert Mills*, my executor and trustee. I desire that £1000 shall be invested for the benefit and advancement of my second son *Charles Spread* on his attaining his majority, viz., twenty-one years. Such sum to be applied as my executors and trustees in their discretion may think fit. I desire that £1000 shall be invested for the benefit of my third son *Yelverton* on his attaining the age of

twenty-one years, which sum shall be for his advancement and applied as my executors and trustees in their judgment think best. I desire that £1000 shall be applied for the personal advancement of my fourth son *Weynton Alexander* on his attaining his twenty-first year as my trustees and executors in their discretion may think fit. The sums specified in the four preceding paragraphs, viz., £1200, £1000, £1000, £1000, should be very judiciously invested, as they are intended specially for the advancement and promotion in life of the respective recipients."

James Annandale Johnston attained the age of twenty-one on the 3rd of October, 1892. He created various incumbrances upon the interest which he took under the testator's will.

On the 29th of January, 1894, the Plaintiff took out a summons for the determination of various questions arising on the administration of the testator's estate, and, amongst others, (*a.*) whether the sum of £1200 by the will directed to be invested for the benefit of *James Annandale Johnston* as above mentioned, or any and what part thereof, ought to be raised out of the estate, and, if raised, whether the said Defendant or his incumbrancers were entitled to have the amount (if any) raised and paid over to him or them, or whether the Plaintiff had a discretion in the application thereof; and (*b.*) whether the respective sums of £1000 by the will directed to be invested or applied for the benefit or advancement of the testator's three other sons as above mentioned, or whether any and what part of such sums respectively ought to be raised and invested. Various orders were from time to time made upon this summons; but the question whether or no the sons were absolutely entitled to the interests given them by the will had not been dealt with.

On the 17th of May, 1894, the Defendant *Charles Spread Johnston* attained the age of twenty-one, and he on the same day took out a summons in these proceedings, asking (*inter alia*) for the determination of the question whether the sum of £1000 by the will of the testator directed to be invested and applied for his benefit was payable to him, he requiring the trustee and executor to pay the same and not to apply it for his benefit. He had subsequently created certain incumbrances upon the interest which he took under the will.

STIRLING, J. 1894 *In re* JOHNSTON. MILLS *v.* JOHNSTON.

Grosvenor Woods, Q.C., and *Phillpotts*, for *Charles Spread Johnston*:—

The legatees are entitled to say that the primary object of the testator was to benefit his sons. That object cannot be effected in the particular way pointed out by the testator, and the legatees are entitled to have the money paid over to them: *Cope* v. *Wilmot* (1); *Re Skinner's Trusts* (2); *Presant* v. *Goodwin* (3). In case of the death of any of the sons before the money was paid or applied for their benefit, their personal representatives could recover it: *Gough* v. *Bult* (4); *Barnes* v. *Rowley* (5). So, also, in case of their bankruptcy, their interests would pass to their trustees in bankruptcy: *Snowdon* v. *Dales* (6); *Younghusband* v. *Gisborne* (7); *Piercy* v. *Roberts* (8); *Green* v. *Spicer* (9). The right of the beneficiary is at least as high as that of his trustee in bankruptcy. In no case, where the testator has directed an absolute appropriation of a particular sum out of his estate for the benefit of a legatee, has the right of such legatee been displaced by the imposition of a discretion to be exercised by a trustee. Where money is directed to be applied solely for the benefit of a legatee he cannot be deprived of the ownership of it.

In re Coleman (10) belongs to a totally different class of cases, viz., cases where a discretion is vested in trustees to apply either the whole or any part of a fund as they think fit for the benefit of an individual, or to determine who out of a given class of persons are to be the objects of the testator's bounty: *Twopeny* v. *Peyton* (11); *Godden* v. *Crowhurst* (12); *In re Sanderson's Trust* (13); *In re Stanger* (14); *Holmes* v. *Penney* (15). *In re Coleman* shews how useless it would be to uphold the discretion of the trustees in a case of this kind. The Court is practically unable to give effect to the discretion, and the legatees are absolutely entitled.

(1) Amb. 704.
(2) 1 J. & H. 102.
(3) 29 L. J. (P. M. & A.) 115.
(4) 16 Sim. 45.
(5) 3 Ves. 305.
(6) 6 Sim. 524.
(7) 1 Coll. 400.
(8) 1 My. & K. 4.
(9) 1 Russ. & My. 395.
(10) 39 Ch. D. 443.
(11) 10 Sim. 487.
(12) Ibid. 642.
(13) 3 K. & J. 497.
(14) 60 L. J. (Ch.) 326.
(15) 3 K. & J. 90.

Grosvenor Woods, Q.C., and *Percival*, for the Defendant *J. A. Johnston*, upon the Plaintiff's summons.

C. E. E. Jenkins, for the Plaintiff:—

The executor desires, if possible, to exercise his discretion under the will, in order to protect the legatees. The question really is one of construction. I do not dispute that if it is once made out that a legacy is given to a person for a particular purpose, the legatee will take, notwithstanding that effect cannot be given to that purpose. Also, if there be a general trust for a legatee, he may, perhaps, demand payment of the legacy to him. But if there be a limited or special trust then different considerations apply. If the trustee desires to exercise his discretion it cannot be taken from him.

There is no general trust in favour of the legatees, but a special trust for their advancement and promotion in life, which would be defeated by handing over the legacies to the mortgagees.

Hastings, Q.C., and *Upjohn*; *Buckley*, Q.C., and *Bardswell*; and *Morshead*, for other parties interested.

Fooks, *Percival*, and *Mark Romer*, for the mortgagees.

1894. June 16. STIRLING, J.:—

Two of the testator's sons have attained twenty-one, and the question is, in substance, whether they are entitled to insist upon payment to themselves of the sums of £1200 and £1000, or whether the trustee has vested in him a valid discretion as to the application. In dealing with that question, it must be borne in mind in the first place that the only persons who are to take any benefit from these two sums of £1200 and £1000 are the legatees themselves. There is no gift over, and no discretion is given to the trustee to apply either the whole or a part of the sums in question for the benefit of the legatees. The whole of the sums are to be so applied. Again, it is to be observed that these sums are to be taken out of the rest of the testator's estate upon each son attaining twenty-one, and are to be invested, and,

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being so set apart and invested, the sole person who has any beneficial interest in any part of them is the son or legatee himself.

The question is, does the law permit the testator to vest such a discretion in his trustee or executor? I have no doubt that the discretion was intended to be conferred by the testator for most excellent reasons, which, indeed, seem to be justified by the events, and I should be very glad to uphold it if I could; but it does seem to me that it is really an attempt by the testator to fetter the enjoyment by a person of a benefit to which he has become absolutely entitled under the will. The testator might (if he had been well advised) have effectually provided for the same object by making the gifts entirely dependent upon the discretion of the trustee. For example, he might have given to the legatees such sums only as the trustee, in the absolute exercise of his discretion, thought ought to be given to them. That would be one way. Another mode of effectually doing it would have been to make in some shape or form a gift over, so as to benefit other persons besides the sons, and in such a way that the legatees in question could not be deemed to be the sole persons interested in the funds. He has not chosen to take advantage of any such mode of gift, but has in each case made the son in question the sole person to take the benefit of the fund which he has directed to be set apart. Under these circumstances, the case seems to me to fall within the class of cases which have been referred to, in which the law has been laid down that a testator is not to be allowed to fetter the mode of enjoyment of persons absolutely entitled to a fund, as, for example, where the testator has attempted to postpone the payment of a sum of money to which a person is absolutely entitled to a later date than the attaining of his majority: see *Saunders* v. *Vautier* (1) and *Gosling* v. *Gosling* (2).

I think also that the decision might be rested on the ground which Mr. *Phillpotts* suggested in his argument—viz., that really, when the words of the will are looked at, the testator is simply pointing out the mode in which these sums, which he had actually given to his sons, should be enjoyed by them. In that class of

(1) Cr. & Ph. 240. (2) Joh. 265.

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cases, of which *Re Skinner's Trusts* (1) is an example, the Court has said that it will not insist on the benefit intended for the legatee being taken by him *modo et forma* as the testator prescribes, on the ground that if the Court attempted to do such a thing, then it would be in the power of the legatee, the day after this had been done, to frustrate the testator's intention by disposing of the benefit which had been given him in pursuance of the testator's will. On both these grounds, it seems to me that, in the events which have happened, the discretion cannot be exercised. It is rather surprising that there should be such an absence of authority on a point of this sort; but I think the case of *Re Skinner's Trusts*, and the observations of Lord *Hatherley*, support the view which I take—that the sons are absolutely entitled to their legacies.

Solicitors: *Mear & Fowler; G. S. & H. Brandon; Sole, Turner, & Knight; Robert Parker; R. Chapman.*

G. A. S.

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June 5, 6, 21.

In re CHRISTCHURCH INCLOSURE ACT. MEYRICK *v.* ATTORNEY-GENERAL.

[1894 C. 1448.]

Commonable Lands—Rights of Turbary—Purchase of Lands by Railway Company—Allotment of Waste Lands to Lord of Manor upon Charitable Trusts—Expenses of Works executed under s. 150 *of the Public Health Act*, 1875—*Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150, 151, 257—"*Owner.*"

A claim for expenses incurred by a local authority for works executed by them under sect. 150 of the *Public Health Act*, 1875, may be sustained in respect of property vested under the authority of Parliament in a trustee for charitable purposes, even although the property cannot be let by reason of a special condition imposed by the Legislature.

ADJOURNED SUMMONS.

The *Christchurch Inclosure Act* (42 Geo. 3, c. xliii.) contains, in sect. 13, the following enactment:—

"And be it further enacted, that the said Commissioners shall,

(1) 1 J. & H. 102.

STIRLING, J. 1894 *In re* CHRIST-CHURCH INCLOSURE ACT. MEYRICK *v.* ATTORNEY-GENERAL.

and they are hereby authorized and required to set out and allot unto and for the lords of the several manors respectively in which the said waste grounds are situated, in trust for the occupiers for the time being of all such cottages and tenements containing less than one acre each as were erected on ancient sites, or have now been erected more than fourteen years, in lieu of their rights, or pretended rights, or custom of cutting turves in the said tythings or liberties of *Muscliff*, *Muckleshell*, *Throop*, *Holdenhurst*, *Pokesdown*, *Iford*, *Tuckton*, and *Week* (commonly called the liberty of *West Stour*), the manor of *Hurn*, and tythings of *Winkton* and *Hinton Admiral* respectively, and in such other tythings (if any) as shall, by virtue of this Act, be divided and allotted as aforesaid, so much and such part or parts of the said waste grounds in such respective tythings, manors, or liberties, as the said Commissioners shall think proper, for a turf common, not exceeding in the whole five acres, or less than two acres, for each cottage or tenement within each tything, manor, or liberty respectively, as shall in the judgment of the said Commissioners be fit and proper for supplying turves for fuel for the use of such cottages or tenements, and which allotments shall for ever afterwards be managed, and the turf arising therefrom shall be cut, taken, and used by the occupiers of such cottages or tenements in such quantities, and at such time or times in every year, and in such manner as the said lords of the said manors respectively, and the churchwardens and overseers of the poor acting for or within such manor, or the major part of them, shall from time to time order and appoint, but such turf common shall not be fed or depastured by any cattle or sheep whatsoever; and that it shall and may be lawful for the lords of the said manors for the time being to act in the execution of the trusts hereby reposed in them by their agents or proxies respectively, such agents or proxies being appointed by writing under the hands of the lords of the said manors respectively, and producing their respective appointments at the time of their acting by virtue thereof."

By their award made in 1806 the Commissioners allotted to the lords of the manors mentioned in sect. 13 certain portions of the waste (comprising in the whole 425 acres) for the purposes of the turf common. It was established by the decisions of the

Court of Appeal and of the House of Lords (1) that the soil of this turf common was beneficially vested in the lords of the manors subject to the trusts imposed by the Act in favour of the cottagers. It was also established by the decision of the Court of Appeal (2) that the trusts in favour of the cottagers created by the Act were charitable trusts. The result, therefore, was that the soil of the turf common was vested in the lord of the manor, subject, as regards the surface, to certain charitable trusts.

The *Bournemouth* Improvement Commissioners, who were formerly the local authority under the provisions of the *Public Health Act*, 1875 (3), in 1890 put in force the powers conferred

(1) 38 Ch. D. 520; [1893] A. C. 1.

(2) 38 Ch. D. 520.

(3) The material sections of the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), are as follows:—

Sect. 4 defines the word "owner" as meaning in the Act "the person for the time being receiving the rack-rent of the lands or premises . . . whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack-rent."

Sects. 150 and 151 enact as follows:—

Sect. 150: "Where any street within any urban district (not being a highway repairable by the inhabitants at large) or the carriageway footway or any other part of such street is not sewered levelled paved metalled flagged channelled and made good or is not lighted to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting adjoining or abutting on such parts thereof as may require to be sewered levelled paved metalled flagged or channelled, or to be lighted, require them to sewer level pave metal flag channel or make good or to provide proper means for lighting the same within a time to be specified in such notice . . . .

"If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by order declare the expenses so incurred to be private improvement expenses."

Sect. 151: "The incumbent or minister of any church chapel or place appropriated to public religious worship, which is now by law exempt from rates for the relief of the poor, shall not be liable to any expenses under the last preceding section, as the owner or occupier of such church chapel or place or of any churchyard or burial-ground attached thereto, nor shall any such expenses be deemed to be a charge on such church chapel or other place, or on such churchyard or burial-ground, or to subject the same to distress execution or other legal

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by the 150th section of that Act and gave notices to the owners of the lands bordering on two roads called the *Ashley Road* and *North Road*, requiring them to sewer, level, pave, metal, flag, and channel those roads. The roads adjoined the turf common, and the present lord of the manors was served with one of these notices. He did not do the work specified in the notice, and such work was done by the Commissioners at an expense of £188 0*s.* 7*d.*

The question on the present summons was whether he was liable for that payment; and as the Corporation of *Bournemouth* (who had become the local authority and succeeded to the rights of the *Bournemouth* Commissioners) were parties to the action, it was agreed that the Court should decide the question between all parties in the present application instead of leaving it to be

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process; and the urban authority may, if they think fit, undertake any works from the expenses of which any such incumbent or minister is hereby exempted."

Sect. 257: "Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act or by any agreement with the local authority, such expenses may be recovered, together with interest at a rate not exceeding £5 per centum per annum, from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred. In all summary proceedings by a local authority for the recovery of expenses incurred by them in works of private improvement, the time within which such proceedings may be taken shall be reckoned from the date of the service of notice of demand.

"Where such expenses have been settled and apportioned by the surveyor of the local authority as payable by such owner, such apportionment shall be binding and conclusive on such owner, unless within three months from service of notice on him by the local authority or their surveyor of the amount settled by the surveyor to be due from such owner, he shall by written notice dispute the same.

"The local authority may, by order, declare any such expenses to be payable by annual instalments within a period not exceeding thirty years, with interest at a rate not exceeding £5 per centum per annum, until the whole amount is paid; and any such instalments and interest, or any part thereof, may be recovered in a summary manner from the owner or occupier for the time being of such premises, and may be deducted from the rent of such premises, in the same proportions as are allowed in the case of private improvement rates under this Act."

determined in a proceeding at law between the Corporation and the lord of the manor.

Buckley, Q.C., and *Ribton*, for Sir *George Meyrick*, the lord of the manor:—

The lord of the manor is not the "owner" of the turf common within the meaning of sect. 150 of the *Public Health Act*, 1875.

If land is vested in any person subject either by the Common Law or by statute to public rights rendering it incapable of being let at a rack-rent, the person in whom it is so vested is not an "owner" of such land within the meaning of the *Public Health Act*. In *Corporation of Birmingham* v. *Baker* (1) it was held that the charge created by sect. 257 of the Act of 1875 for sewering expenses, and for the payment whereof the "owner" of the premises in respect of which the same are incurred is liable, is a charge, not on the interest of any particular owner, but on the total ownership—that is to say, on the respective interests of every owner for the time being. That case was distinguished in *Guardians of Tendring Union* v. *Dowton* (2), but not doubted by the Court of Appeal. In *Angell* v. *Vestry of Paddington* (3) the trustees of a church, round which there was a piece of land, were held not liable as "owners" to be assessed for paving expenses under the *Metropolis Management Acts*, the principle of the decision being that there was, in that case, no owner who could let at a rack-rent.

It is true that in *Lord Northbrook* v. *Plumstead Board of Works* (4) Lord *Northbrook*, in whom the soil of certain private roads leading into a new street was vested, was held liable for paving expenses of the street in respect of that portion of the private roads which abutted on the street; but Lord *Coleridge*, C.J., in *Plumstead Board of Works* v. *British Land Company* (5), contrasted that case with the one before him, in which he held that the defendants in whom the soil of roads dedicated to the public on a building estate laid out by them was vested, were not the "owners" of the rectangular spaces

(1) 17 Ch. D. 782.
(2) [1891] 3 Ch. 265.
(3) Law Rep. 3 Q. B. 714.
(4) Ibid. 7 Q. B. 183.
(5) Law Rep. 10 Q. B. 203.

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formed by the intersection of such roads. The distinction between those two cases is, that Lord *Northbrook* could have closed his private roads and let the land. In *Great Eastern Railway Company* v. *Hackney District Board of Works* (1), Lord *Watson* states the law to be that "the person vested with the property of heritable subjects which have been placed '*extra commercium*,' or are subject in perpetuity to the burden of a public right which deprives him of their beneficial use, is not an owner of land within the meaning of the 77th section of the Act of 1862."

In *Wright* v. *Ingle* (2) the trustees of a chapel were held to be the "owners" of the chapel for the purposes of the *Metropolis Management Acts*; but the ground of that decision was that the trusts in that case might at any moment be put an end to, and the property let at a rack-rent; and the observations of Lord Justice *Bowen* shew that, in his opinion, where (as in this case) premises are prevented by Act of Parliament from being let at a rack-rent, there never can, while that incapacity subsists, be an "owner" of them within the meaning of sect. 250 of the *Metropolis Management Act*, 1855. Again, the *ratio decidendi* in the *Vestry of St. Giles, Camberwell* v. *London Cemetery Company* (3) was that the property there was not "*extra commercium*," and, therefore, was assessable. In *Conservators of the River Thames* v. *Port Sanitary Authority of the Port of London* (4) the conservators were held not to be the "owners" of the soil and foreshore of the river for the purposes of sect. 4 of the *Public Health (London) Act*, 1891.

Here the soil of the common is vested in the lord, subject to certain rights which have been held to constitute a charitable trust. He is the owner, subject to a public object created by statute, which prevents him dealing with the surface of the land. He cannot let it at a rack-rent. The common has never been rated to the poor, and never could have been: *Mayor of Lincoln* v. *Overseers of Holmes Common* (5). There are recitals in two Acts of Parliament—viz., the *Bournemouth Park Lands Act*, 1889,

(1) 8 App. Cas. 687, 693.
(2) 16 Q. B. D. 379.
(3) [1894] 1 Q. B. 699.
(4) Ibid. 647.
(5) Law Rep. 2 Q. B. 482.

and the *Bournemouth Cemetery Act*, 1891—to the effect that the land in question is unproductive.

[STIRLING, J.:—Is it admitted that no profit can be made out of it?]

It is clear that that is the case.

Ingle Joyce, for the Attorney-General:—

I adopt the argument on behalf of the lord of the manor. This is a statutory charity, and the land in question cannot, so long as the statute is in force, be dealt with in any manner inconsistent with the object for which the charity was created.

Hastings, Q.C., and *Kenyon Parker*, for the Corporation of *Bournemouth*:—

The whole of the subjacent soil of this piece of land belongs to the lord of the manor, and though he may not pasture sheep thereon, or do anything which would interfere with the right of cutting turves, he is entitled to cut down whatever trees or brushwood are thereon, or to cut any grass that may be there, and to the right of sporting thereon, whatever the value of that right may be; and it is possible that the land may be made productive in some other way. There is no case in which the Court has held that the position of "owner" cannot exist where the land cannot be let at a rack-rent. But the converse was held in *Bowditch* v. *Wakefield Local Board of Health* (1), where the trustee of a school for poor children was held to be an "owner" of premises, although the premises could never be let at a rack-rent; and a claim for expenses similar to the present was enforced against him. That case is accordingly an authority that here the lord of the manor is an "owner" within the meaning of the *Public Health Act*, 1875, and it was recognised by the Court of Appeal without question in *Wright* v. *Ingle* (2), though some of the observations of Lord Justice *Bowen* in *Wright* v. *Ingle* do not seem quite reconcilable with it.

[STIRLING, J.:—The 151st section seems to exempt the places of public worship and their incumbents or ministers, but not the owners.]

(1) Law Rep. 6 Q. B. 567. (2) 16 Q. B. D. 379.

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The case of *Angell* v. *Vestry of Paddington* (1) only decided that a church was not a "house" or "land" within the *Metropolis Management Acts*, and neither that case nor *Great Eastern Railway Company* v. *Hackney District Board of Works* (2) (which was also a case under the *Metropolis Local Management Acts*) are authorities upon the present question.

It is contended that this land, being a public charity created by statute, cannot be dealt with by way of lease or sale. But there is no absolute incapacity to let or sell it. In many cases lands belonging to charities have been sold by order of the Court, for when a charity has failed to fulfil its primary objects the Court has jurisdiction *cy-près* to alter its property; and apart from the statute, the charity authorities and the trustees together could, by scheme approved by the Court, deal with this charity so as to give rights over it.

[STIRLING, J., referred to *In re Parke's Charity* (3); *In re Overseers of Ecclesall* (4); *In re Suir Island Female Charity School* (5); and *In re Alderman Newton's Charity* (6).]

When once a statutory charity has been created, unless there is something special in its Act, there is nothing to exempt that charity from the ordinary jurisdiction applicable to private charities. Now, sect. 13 of the *Christchurch Inclosure Act* does not prevent this turf common from being managed and made available as a charity in the best manner for the time being, and it is not a property which is absolutely prohibited from being let. There is no decision that extra-commercial property is unletable, and that is the conclusion to which *Cotton*, L.J., came in *Wright* v. *Ingle* (7).

Buckley, in reply.

[STIRLING, J.:—How do you distinguish this case from *Bowditch* v. *Wakefield Local Board of Health*? (8)]

There is an essential difference between charities created by Act of Parliament and charities created by private individuals.

(1) Law Rep. 3 Q. B. 714.
(2) 8 App. Cas. 687.
(3) 12 Sim. 329.
(4) 16 Beav. 297.
(5) 3 J. & Lat. 171.
(6) 12 Jur. 1011.
(7) 16 Q. B. D. 396.
(8) Law Rep. 6 Q. B. 567.

The Legislature has said that this piece of land is to be "for ever" managed, and the turf arising therefrom cut, taken, and used in a particular way. The objects of the charity have not failed, and it must go on in this way unless and until the Legislature otherwise provides. [He referred to *Tudor's* Charitable Trusts (1); *Reg.* v. *School Board for London* (2); *In re Shrewsbury School* (3).]

Hastings:—

No turf has been cut from this common for sixty years.

1894. June 21. STIRLING, J. (after stating the facts of the case, and referring to the 13th section of the *Christchurch Inclosure Act*, continued):—

On behalf of the lord of the manor it is contented that he is not "owner" of the common within the meaning of the *Public Health Act*, 1875, inasmuch as the provisions of the *Inclosure Act* prevent the common from being let at a rack-rent. These provisions unquestionably interfere with the beneficial ownership of the lord to a material extent; I am not satisfied that they entirely prevent the common from being let, but shall for the purposes of this judgment assume such to be the case.

In *Bowditch* v. *Wakefield Local Board of Health* (4) the person who was sought to be charged as owner held the property as one of three trustees to whom land had been conveyed under 4 & 5 Vict. c. 38, s. 2, for the purposes of the Act, and to permit the premises and all buildings erected thereon to be for ever used as a school for the education of poor children and for the residence of the master and mistress, and for no other purpose whatsoever. Therefore the trusts of the deed prevented any occupation of the premises except for the purposes of a school, and for the residence of the master and mistress. But it does not stop there, because the 4 & 5 Vict. c. 38, s. 2, enabled owners of land, including tenants for life, to convey in fee simple any quantity not exceeding one acre of such land as a site for a school subject to a proviso (as to conveyances by tenants for life) that upon the

(1) 3rd Ed. pp. 89, 250.
(2) 17 Q. B. D. 738.
(3) 1 Mac. & G. 85, 324.
(4) Law Rep. 6 Q. B. 567.

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land so granted ceasing to be used for the purposes of the Act the same should revert to the estate. The Legislature therefore annexed a condition to the validity of such a conveyance which prevented the letting of the land so conveyed; nevertheless, it was held that the appellant was the "owner," and liable to a rate similar to that which is in question here. Lord *Blackburn* in that case said (1): "The definition of 'owner,' however, in sect. 2 does not say 'owner' shall include, but shall mean. Now, though these premises are and must be held as schools, and cannot be let for any purpose, yet, if they were let, the rent would come to the appellant. I think, therefore, he is 'owner' within the meaning of the definition." And Mr. Justice *Mellor* took the same view, and pointed out that in the Act of 1848 (which is not materially different in that respect from the Act of 1875) there is a special exemption from all liability to expenses in respect of churches and chapels, but not in respect of other charities.

That is a very strong case, and it has been recognised by the Court of Appeal in *Wright* v. *Ingle* (2), which related to a Non-conformist chapel. There the trustees of the chapel were held to be the "owners" of it, and as such liable to contribute to the expense of paving a new street. The decision does not, however, govern the present case, because there the Court of Appeal arrived at the conclusion that the trustees had a power of letting; but *Bowditch* v. *Wakefield Local Board of Health* (3) was referred to by all the learned Judges, and was not questioned by any of them. The last-mentioned case shews that a claim, such as is made in the present case, may be sustained in respect of property vested under the authority of Parliament in a trustee for charitable purposes, even although the property cannot be let by reason of a special condition imposed by the Legislature. In principle that decision appears to me to govern the present case, though, no doubt, various distinctions based on differences of fact may be drawn between them. The argument which was mainly relied on was founded on the observations of Lord *Bowen* in *Wright* v. *Ingle*, where he said (4): "Sect. 250 does not confine

(1) Law Rep. 6 Q. B. 570.
(2) 16 Q. B. D 379.
(3) Law Rep. 6 Q. B. 567.
(4) 16 Q. B. D. 402.

the term 'owner' to those persons who could receive a rack-rent from the particular premises, or who could let them at a rack-rent; it includes those persons who would receive the rack-rent if the premises were let at such a rent, and I think *Bowditch* v. *Wakefield Local Board of Health* (1) is a conclusive authority, if authority were wanted, to shew that a man is not the less the 'owner' of premises, because, by the provisions of the deed under which he holds them, they cannot, so long as he holds them, be let at a rack-rent. Whether in the case of premises which were prevented by an Act of Parliament from being let at a rack-rent, there ever could be an 'owner' within the meaning of sect. 250, I very much doubt. I am inclined to think that, if the incapacity to be let were stamped on the premises, they never could have an 'owner' within the meaning of sect. 250." I need not say that that expression of opinion is entitled to the greatest weight; but I am not persuaded that the learned Lord Justice who expresses his approval of *Bowditch* v. *Wakefield Local Board of Health* meant his remarks to apply to a case such as the present. In my opinion, therefore, the claim of the *Bournemouth* Corporation ought to be allowed.

I declare the sum payable by the Plaintiff to be a charge upon the land.

Solicitors: *Crawley, Arnold & Co.; Solicitor to the Treasury; Lovell, Son, & Pitfield,* agents for *J. & W. H. Druitt, Bournemouth.*

(1) Law Rep. 6 Q. B. 567.

W. W. K.

STIRLING, J.

1894

June 8, 9, 28.

In re OWEN.

[1894 O. 185.]

Statute of Limitations—Legacy Charged on Contingent Reversionary Interest in Land—Falling into Possession—"Present right to receive"—Remedy by Foreclosure or Sale—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *ss.* 1, 2, 8.

A testator, who died in 1854, being, under the will of his father, entitled to a contingent reversionary interest in land, devised all his real estate, including the reversionary interest, to his wife for life, and, after her decease, he charged the same with a sum of money which he bequeathed in four legacies of equal amount to his son and three daughters; and, subject thereto, he devised all his real estate and the contingent interest to his son. The widow died in 1880; and shortly after her death the whole of the testator's real estate then in actual possession was sold, and the legacies were partly paid; but no steps were taken to realize the testator's interest under his father's will previously to its falling into possession, which happened in 1893:—

Held, that the right of the legatees to recover the balance of their legacies was barred by sect. 8 of the *Real Property Limitation Act*, 1874.

Hugill v. *Wilkinson* (1) explained and distinguished.

A person entitled to the benefit of an equitable charge created by will upon a reversionary interest in land has no remedy by way of foreclosure, but only by way of sale or mortgage of such interest.

Adjourned summons.

David Owen, who died in 1823, devised his real estate upon certain trusts for the benefit of *Mary Hannah Postlethwaite* during her life, and after her death in the event, which happened, of her not leaving issue, upon trust for the four children of his brother *Edward Owen*, in equal shares as tenants in common in fee simple.

Mary Hannah Postlethwaite died on the 28th of February, 1893, and thereupon the devise in favour of the children of *Edward Owen* took effect in possession. One of the children of *Edward Owen* was *Edward Owen* the younger, who died on the 29th of March, 1854, having made his will, dated the 31st of October, 1853, whereby he gave to his wife *Mary Owen* absolutely certain personal estate exonerated from payment of his debts, which he

(1) 38 Ch. D. 480.

charged on his real estate. He devised all his real estate, and also his contingent interest under the will of *David Owen*, to his wife, *Mary Owen*, for her life; and after her decease he charged the same with the sum of £8000, which he bequeathed as follows: £2000 to his son *Edward Owen*, £2000 to his daughter *Dorothy*, £2000 to his daughter *Mary*, and £2000 to his daughter *Ellinor*; and subject and charged as aforesaid he devised all his said real estate and contingent interest aforesaid unto his son *Edward Owen*, his heirs, executors, administrators, and assigns. After directing each legacy so given to his daughters to be settled, he further declared that in case his real estate and the contingent reversionary interest aforesaid should not, if sold and after payment of debts, realize the sum of £8000, that each such legacy to his daughters should abate, so that his son should have an amount and share equal with his sisters in the amount that, under the circumstances, might be realized therefrom. He appointed his widow executrix; but the will contained no disposition of his residuary personal estate. *Mary Owen*, the widow of the testator *Edward Owen*, died on the 10th of February, 1880, in the lifetime of *Mary Hannah Postlethwaite*.

A deed, dated the 22nd of November, 1880, was executed by (amongst others) the son and three daughters of the testator, *Edward Owen*, in which it was recited that the whole of the real estate of which the testator was in actual possession had been sold at the date of the deed, and that each of them had received out of the proceeds a sum of £1844, in part discharge of the legacy of £2000, "leaving" (in the words of the recital) "each of them . . . . still entitled to receive a sum of £156 each from the unrealized estate of the testator, as the balance of the said legacy of £8000." By this deed the legacies bequeathed to the testator's three daughters were assigned to trustees upon the trusts declared by the will of the testator in favour of his said daughters, their respective husbands, children and issue. No steps were taken to realize the testator's interest under the will of *David Owen* during the lifetime of *Mary Hannah Postlethwaite*; and no further payment was made in respect of the sum of £8000 charged by the testator's will on his real estate. Part of the real estate of *David Owen* having been sold and the proceeds paid into

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Court under the *Lands Clauses Consolidation Act*, a petition was presented asking for the distribution of the fund in Court, upon which an order was made directing payment out of three-fourths of the fund to the persons entitled; but as to the remaining fourth, representing the share of the testator *Edward Owen*, the petition was adjourned into Chambers, and a summons was taken out by the residuary devisee under the will of the testator asking that the petition might be proceeded with. Upon this summons the question arose whether all claims in respect of the £8000 were not barred by the *Statute of Limitations*.

The summons was adjourned into Court, and now came on for hearing.

Hastings, Q.C., and *Gaselee*, for the residuary devisee:—

The claim in respect of the legacies is barred by sect. 8 of the *Real Property Limitation Act*, 1874. The fact that the land on which the legacies are charged has been compulsorily taken and so converted into money makes no difference. Sect. 2 of the Act, which provides for the case of estates or interests in reversion, does not apply to a legacy charged upon land.

The statute began to run on the death of *Mary Owen* in 1880. At that time a "present right to receive" the legacies "accrued to some person capable of giving a discharge for the same": *Humble* v. *Humble* (1). At the date of *Mary Owen's* death the legatees might have instituted proceedings to have their legacies raised and paid out of the reversion by sale or mortgage: *Hornsey Local Board* v. *Monarch Investment Building Society* (2). *In re Blachford* (3), which was referred to in Chambers, was a case under sect. 10; and there there was a trust, which is not the case here. *In re Johnson* (4) was a decision upon a different Act, and does not apply.

[STIRLING, J., referred to *In re Davis* (5).]

"A present right to receive" the legacies accrued immediately on the death of *Mary Owen*. There is no suggestion of any acknowledgment, and consequently the right to recover is now

(1) 24 Beav. 535.
(2) 24 Q. B. D. 1.
(3) 27 Ch. D. 676.
(4) 29 Ch. D. 964.
(5) [1891] 3 Ch. 119.

gone. It cannot make any difference that the interest upon which the legacies are charged is reversionary. The testator evidently contemplated the necessity of a sale before the reversion fell into possession.

Warrington, for the trustees of the indenture of the 22nd of November, 1880:—

The Court is not bound to commit an act of injustice. From the recitals in the deed of the 22nd of November, 1880, it is clear that all parties agreed that the sale of the reversion should be postponed.

But upon the statute itself I submit that the legatees are not barred. Taking it first as a charge upon the land only, the case is almost identical with *Hugill* v. *Wilkinson* (1), where Mr. Justice *North* held that time begins to run, for the purpose of barring an equitable charge on a contingent reversionary interest in land, only from the time the interest falls into possession.

[STIRLING, J.:—That decision is grounded upon there being an action to recover the land. It has been decided by the Court of Appeal that the relief to which an equitable mortgagee is entitled is foreclosure and not sale: *James* v. *James* (2). If you can make out that this is a proceeding not to recover the legacies but to recover the land, that will go a long way to support your contention.]

The principle is that an equitable mortgage involves an agreement to execute a legal mortgage. It makes no difference that the charge is created by will, and our remedy is either by sale or foreclosure: *Backhouse* v. *Charlton* (3); *London and County Banking Company* v. *Dover* (4). Mr. Justice *Kekewich* has held, in *Sadler* v. *Worley* (5), that debenture-holders are entitled to foreclosure.

[STIRLING, J.:—That depends on contract. The cases on sect. 40 of the Act of 1833 shew that, although the legatee may be barred if suing only for the money, yet, if he is suing to recover the land, different considerations are involved.]

(1) 38 Ch. D. 480.
(2) Law Rep. 16 Eq. 153.
(3) 8 Ch. D. 444.
(4) 11 Ch. D. 204.
(5) [1894] 2 Ch. 170.

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Treating this as a legacy, I contend that time could not run against the legatees until there were assets out of which the legacies could be paid. It is a legacy payable out of a fund falling in at a future period, and not recoverable until then: *Earle* v. *Bellingham* (1). The legacy is payable out of the residuary personal estate as well as out of the land. The legatees could only have recovered by bringing an action against the personal representatives of the testator, and there were none after *Mary Owen's* death. If this had been a charge on a reversionary interest in personalty we could have recovered: *Smith* v. *Hill* (2). The question really turns upon whether there is any difference for this purpose between an equitable charge created by will and one arising out of contract: *Fisher* on Mortgages (3). Although none of the cases there cited relate to charges by will, the same rule applies: *Hugill* v. *Wilkinson* (4); *Tennant* v. *Trenchard* (5).

Hastings, in reply:—

In the case of a mortgage, whether equitable or otherwise, there is the bargain that the lender is to have the estate if he does not get back his money, and so a right of sale is implied. But that principle can only apply to a case of contract. It has never been held that a person entitled under a will to a charge upon an estate can take the estate if the charge is not paid.

1894. June 28. STIRLING, J. (after stating the facts, continued):—

It was contended that the recitals in the deed of the 22nd of November, 1880, were evidence of an agreement that the payment of the balance of the £8000 should be postponed until the death of *Mary Hannah Postlethwaite*. I am unable to come to this conclusion. There appears to be nothing in the deed which could prevent any of the legatees from requiring at any time that the interest of the testator under the will of *David Owen* should be sold, and the proceeds applied in satisfaction of the unpaid balance. I am also of opinion that this sum of £8000

(1) 24 Beav. 448.
(2) 9 Ch. D. 143.
(3) 4th Ed. pp. 480, 481.
(4) 38 Ch. D. 480.
(5) Law Rep. 4 Ch. 537.

was not a legacy payable out of the personal estate of the testator, but constituted simply a charge on his real estate and on his interest under the will of *David Owen*. I have not, therefore, to consider the case of a legacy payable by a legal personal representative, to whose hands assets sufficient to answer the legacy came for the first time on the death of *Mary Hannah Postlethwaite*; and consequently the decision is not governed by such cases as *Adams* v. *Barry* (1), *In re Johnson* (2), and *In re Davis* (3), or the principles there laid down.

It is enacted by the *Real Property Limitation Act*, 1874, s. 8, that "no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same." The words "present right to receive" are to be read according to their ordinary meaning in the English language: *Hornsey Local Board* v. *Monarch Investment Building Society* (4). Now, a present right to receive this sum of £8000 accrued in 1880: in fact, part was then received by each of the persons to whom it was payable; and the balance might have been raised by a sale or mortgage of the interest of the testator under the will of *David Owen*. In my opinion, the right to recover the balance is barred by this enactment.

In opposition to this conclusion, there was cited the case of *Hugill* v. *Wilkinson* (5), where it was held that an equitable mortgagee of a reversionary interest in land is not debarred from asserting his claim against the land until the expiration of twelve years from the time when the reversionary interest falls into possession. When the grounds of that decision are examined, they are found to be these: first, that an equitable mortgagee has a remedy against the land by way of foreclosure; secondly, that an action for foreclosure is not an action to recover money charged on land, but to recover land itself: *Harlock* v.

(1) 2 Coll. 290.
(2) 29 Ch. D. 964.
(3) [1891] 3 Ch. 119.
(4) 24 Q. B. D. 1.
(5) 38 Ch. D. 480.

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Ashberry (1); *Heath* v. *Pugh* (2); and, thirdly, that the time within which an action for the recovery of land may be brought is regulated, not by sect. 8, but by sects. 1 and 2 of the *Real Property Limitation Act*, 1874. The question then arises, whether any such reasoning applies to the present case; and it appears to me that it does not apply, unless the persons entitled to the benefit of these charges on the land have in respect of them a right of foreclosure.

No case has been cited in which the owner of a charge on land created by will has been held entitled to foreclosure. The grounds on which the Court grants foreclosure are applied by Vice-Chancellor *Wigram* in *Sampson* v. *Pattison* (3). In that case it was held that a conveyance of an estate to *A.*, in trust that the same should stand chargeable with a sum of money and interest, and subject thereto in trust for *B.*, with a power of sale by *A.*, upon non-payment, after notice, is not a mortgage entitling *A.* to file his bill for foreclosure, but that it entitles him to the aid of the Court in effecting a sale. The Vice-Chancellor says (4): "The only question is—What are the terms of the contract? They are, simply, that a certain sum of money and interest shall be a charge on the estate, and if the same be not paid at a particular time, the party entitled to the money shall have power to sell the estate. There is no right of foreclosure arising out of such a contract. Where a charge is created by mortgage, the condition of which is, that if the money be not paid at a certain day, the estate of the mortgagee shall be absolute at law, this Court says that the failure in payment at the day shall not work a forfeiture, notwithstanding the express words of the contract; and upon the bill of the mortgagee, a further time for payment is appointed: if the money be not then paid, the Court refuses again to interfere, and leaves the parties to their legal rights. The frame of the instruments under which the parties claim, in this case, do not bring them in any respect within the principle that the decree of foreclosure proceeds upon." See also *Jenkin* v. *Row* (5).

(1) 19 Ch. D. 539.
(2) 6 Q. B. D. 345; 7 App. Cas. 235.
(3) 1 Hare, 533.
(4) Ibid. 535.
(5) 5 De G. & Sm. 107.

It is settled that the relief to which an equitable mortgagee of real estate by deposit of the title-deeds is entitled is foreclosure and not sale: *James* v. *James* (1); the reason appears to be that the Court treats the deposit as evidence of an agreement to create a legal mortgage: see the judgments of Lord *Cottenham* in *Parker* v. *Housefield* (2), and of Sir *George Jessel* in *Carter* v. *Wake* (3). It appears, also, to be the better opinion that, under 1 & 2 Vict. c. 110, s. 13, a judgment creditor was, prior to the passing of the statute 27 & 28 Vict. c. 112, entitled to foreclosure, on the ground that the former statute places the judgment creditor in the same position as regards remedies in equity as if the judgment debtor had by writing under his hand agreed to charge the hereditaments against which the judgment is sought to be enforced: see the judgment of Lord Justice *Turner* in *Ex parte Boyle* (4). In *Tennant* v. *Trenchard* (5), Lord Chancellor *Hatherley* says (6): "Although some of the authorities appear to conflict with each other, it seems, on the whole, to be settled that if there is a charge *simpliciter*, and not a mortgage, or an agreement for a mortgage, then the right of the parties having such a charge is a sale, and not foreclosure." Possibly a testator might so express himself as to shew that he intended the owner of a charge created by his will to have the like remedies as are conferred by statute on the judgment creditor; but I do not think, regard being had to the authorities to which I have referred, that such an intention can be inferred from the language of the will with which I have to deal. I think, therefore, that the remedy in the present case was to have the sums mentioned realized by sale or mortgage of the property charged, and not by way of foreclosure, and consequently that the period of limitation is defined by sect. 8, and not by sects. 1 and 2, of the *Real Property Limitation Act*, 1874.

Solicitors: *Kingsford, Dorman & Co.*, agents for *Arnold & Son, Birmingham; Patersons, Snow, Bloxam, & Kinder*, agents for *Longueville & Co., Oswestry.*

(1) Law Rep. 16 Eq. 153.
(2) 2 My. & K. 419.
(3) 4 Ch. D. 605.
(4) 3 D. M. & G. 515, 530.
(5) Law Rep. 4 Ch. 537.
(6) Ibid. 542.

G. A. S.

KEKEWICH, J.

1894

June 15.

COLLINS *v.* NORTH BRITISH AND MERCANTILE INSURANCE COMPANY. PRATT *v.* SAME.

[1894 C. 408.]

Practice — Concurrent Writ—Service out of Jurisdiction — Irregularity— "Action properly brought against Person duly served within the Jurisdiction"—Separate Relief against Defendants within and out of Jurisdiction— Rules of Supreme Court, 1883, *Order* VI., *r.* 1; *Order* XI., *rr.* 1 (*g*), 4.

Where leave is granted for the issue of a concurrent writ to be served on a person out of the jurisdiction, the copy served ought to be marked "concurrent," and if this is not done the service is irregular.

On an application to serve a person out of the jurisdiction under Order XI., rule 1 (*g*), it must be shewn that the defendant within the jurisdiction against whom relief is sought has, previously to such application, been duly served with the writ.

Yorkshire Tannery and Boot Manufactory v. *Eglinton Chemical Company* (1) followed, notwithstanding observations thereon in *Tassell* v. *Hallen* (2).

In order to bring a case within Order XI., rule 1 (*g*), the relief sought against the defendant out of the jurisdiction must be not necessarily the same as, but connected with the relief sought against the defendant within the jurisdiction. Where, therefore, an action was brought by a trustee in bankruptcy against mortgagees, resident within the jurisdiction, of the interest of the bankrupt under a will in property situate out of the jurisdiction, and against the trustee of the will, who was resident out of the jurisdiction, claiming accounts and redemption against the mortgagees, and as against the trustee, that out of the property in his hands in trust for the bankrupt he should be directed to pay the sums found due to the mortgagees, and pay and account for the value of the property to the Plaintiff as trustee in bankruptcy:—

Held, that the relief sought against the mortgagees was not so connected with the relief sought against the trustee as to bring the case within Order XI., rule 1 (*g*); and that leave to serve the writ on the trustee ought not to be granted.

Motion.

By the writ in this action the Plaintiff claimed, as trustee in bankruptcy of the property of *George Frederick Wells*, a bankrupt, and as such entitled to the property thereinafter mentioned (subject to the mortgages and incumbrances thereon)—

(1) 54 L. J. (Ch.) 81. (2) [1892] 1 Q. B. 321.

(1.) As against the Defendants the *North British and Mercantile Insurance Company*, to have an account taken of what was due to such Defendants as mortgagees from *George Frederick Wells* for principal, interest, and costs under an indenture of mortgage dated the 6th of May, 1891, and a deed of covenant by *George Frederick Wells* of even date.

(2.) As against the Defendants *Henry Isaacs* and *John Edwards*, to have an account taken of what was due to such Defendants, as mortgagees, from *George Frederick Wells* for principal, interest, costs, and otherwise, under an indenture of mortgage dated the 13th of May, 1891, and an indenture of transfer dated the 30th of December, 1891.

(3.) As against the Defendant *Christopher Robinson*, "as sole surviving executor and trustee under the will of *Frederick Wells*, deceased, ... that out of the property in his hands, as such trustee in trust for the said *George Frederick Wells*, he be directed to pay the sum found due to the above-named Defendants, as mortgagees of the said property of the said *George Frederick Wells*, on taking such accounts as aforesaid, and pay and account for the value of the said property to the Plaintiff as trustee in bankruptcy of the property of the said *George Frederick Wells* as aforesaid."

Frederick Wells, the father of *George Frederick Wells*, by his will dated the 25th of September, 1876, gave the bulk of his property to the Defendant, *Christopher Robinson*, and *William Henry Billing* and *Henry Hatch*, all residing in *Canada*, in trust for sale, and to apply the income arising from the investment of the proceeds of sale as they should think fit for and towards the maintenance and education of his children, *George Frederick Wells* and *Nina Fredericka Wells*, and pay the same to their guardian without seeing to the application thereof; and upon his youngest child, the said *Nina Fredericka*, attaining twenty-one years, to make an equal division of his estate between her and his son *George Frederick*. The trustees were given full power to apportion any part of the testator's real estate, not sold at the time of distribution, in their unfettered discretion, except as to a part thereof which the testator's son was to have the option of taking as part of his share. The trustees were

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empowered to postpone the sale of the estate in their uncontrolled discretion.

The testator died on the 4th of July, 1877, and his will was proved in the Surrogate Court of the county of *York, Canada,* by the Defendant *Christopher Robinson* and *W. H. Billing, H. Hatch* having renounced probate. *W. H. Billing* had since died, and *Christopher Robinson* was the sole executor and trustee of the will.

George Frederick Wells, shortly after attaining his age of twenty-one years, executed the several mortgages referred to in the writ in this action. These mortgages comprised all his interest under the will of his father.

Nina Fredericka Wells attained the age of twenty-one years on the 27th of January, 1894.

On the 22nd of August, 1891, *George Frederick Wells* was adjudged bankrupt in the High Court of Justice in Bankruptcy, and the Plaintiff *Collins* was appointed trustee in the bankruptcy.

The Defendant *Christopher Robinson* was resident at *Toronto* in *Canada,* and the Plaintiff *Collins* accordingly applied for leave to issue a concurrent writ for service on him in that country pursuant to Order VI., rules 1 and 2.

By his affidavit filed in support of this application the Plaintiff *Collins,* after stating the nature of the action, proceeded as follows. Par. 2: "The Defendants the *North British and Mercantile Insurance Company* and the Defendants *Henry Isaacs* and *John Edwards* can be served within the jurisdiction of this Court with the writ of summons in this action." Par. 3: "The Defendant *Christopher Robinson* resides or may probably be found at *Toronto* in the Dominion of *Canada,* out of the jurisdiction of this Court, and is a British subject." Par. 4: "The value of the interest of the said *George Frederick Wells* in the said residuary estate is, according to information obtained by me as trustee in the said bankruptcy, about £20,000 and sufficient after payment of the said mortgages to leave a large surplus for administration in the said bankruptcy." Par. 5: "I desire the leave of the Court to serve the writ in this action upon the said *Christopher Robinson* in *Toronto* aforesaid out of the jurisdiction of this Honourable Court."

On the 22nd of February, 1894, Mr. Justice *Kekewich* granted the application, and made an order for the issue of the concurrent writ. The order was not drawn up; but in the notes of the Chief Clerk there appeared the following entry: "Writ to issue. A. K. 22/2/94." At this time the writ had not been served on the English Defendants.

The concurrent writ was duly issued and marked as "concurrent" pursuant to Order VI., rule 1. It was served on the Defendant *Robinson* at *Toronto* in *Canada*, but the copy served was not marked "concurrent."

The original writ was subsequently amended by the insertion of an offer to redeem the mortgagees.

The Plaintiff *Collins*, having retired from the office of trustee in bankruptcy, was succeeded therein by *Herbert J. Pratt*, and by an order of the 16th of April, 1894, *Pratt* was substituted for *Collins* as Plaintiff.

This was a motion on behalf of the Defendant *Robinson* under Order XII., rule 30, asking that the order or fiat dated the 22nd of February, 1894, in the action, whereby liberty was given to serve the writ of summons on the said Defendant at the city of *Toronto* in the Dominion of *Canada* out of the jurisdiction of the Court, might be discharged, and that the service of the writ and all subsequent proceedings in the action might be set aside as against the Defendant *Robinson*, on the ground that the subject-matter of the action did not fall within any of the cases in respect of which service out of the jurisdiction might be allowed under the Rules of the Supreme Court, Order XI., r. 1 (*a*) to (*f*), and on the further ground that the action was not properly brought against any person within the jurisdiction, and on the further ground that leave to serve the writ on the Defendant *Robinson* was granted before the writ had been actually served upon the other Defendants within the jurisdiction, and on the further ground that the application for the order was not supported by the evidence required by the Rules of the Supreme Court, Order XI., r. 4, and that the Plaintiff might be ordered to pay to the Defendant *Robinson* his costs of the application.

The Defendant *Robinson*, by his affidavit in support of the motion, stated that the testator was domiciled and resident in

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Toronto; that he, the deponent, was also domiciled and resident in that city, and that all the property, estate, and effects of the testator, so far as the deponent had ever heard, were situate in that province, and had always been administered there. He further stated, that it would cause great delay and inconvenience, and be productive of very large and unnecessary cost and expense to the estate, to take accounts in reference to the property elsewhere than in *Toronto*; that the property consisted of lands, and owing to the present great depression in land values the time was most unfavourable to sell the same; and the trustees, in exercise of their discretion under the will, had deferred the sale of the testator's real estate.

Warmington, Q.C., and *J. H. Redman*, in support of the motion:—

There are four grounds of objection to the service of this writ.

First, the copy of the writ served on the Defendant was not marked as "concurrent," and therefore was not a true copy in conformity with Order VI., rule 1, which requires that every concurrent writ shall be marked with a seal bearing the word "concurrent."

Secondly, leave for service out of the jurisdiction must, in this case, have been obtained under Order XI., rule 1 (*g*), which allows such service when "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." When the application for the order of the 22nd of February, 1894, was made, the English Defendants had not been served, and it has been decided by *Pearson*, J., in *Yorkshire Tannery and Boot Manufactory* v. *Eglinton Chemical Company* (1) that it is a condition precedent to the granting of an application for service out of the jurisdiction under clause (*g*), that the defendant within the jurisdiction should previously have been duly served.

Thirdly, Order XI., rule 4, requires that the application for leave to serve out of the jurisdiction shall be supported by evidence that, in the belief of the deponent, the plaintiff has a good cause of action. The affidavit in support of the applica-

(1) 54 L. J. (Ch.) 81.

tion for the order of the 22nd of February, 1894, did not state that the deponent believed he had a good cause of action. It was also insufficient in that it did not state that the Defendant *Robinson* was a necessary or proper party to the action, so as to bring the case within clause (*g*).

Fourthly, the nature of the action is such that leave to serve the writ on the Defendant *Robinson* out of the jurisdiction ought not to have been granted at all. The cause of action against *Robinson* is entirely distinct from the cause of action against the mortgagees. The action against *Robinson* is one for account by him in his character of trustee, and as to such account the mortgagee Defendants are in the same interest as the Plaintiff. The action against the mortgagees is for redemption, and it is clear that *Robinson* is a stranger to that cause of action. This is, in truth, a made-up action in which, under the guise of seeking relief against the mortgagees within the jurisdiction, it is really sought to get an account against *Robinson*, who is domiciled out of the jurisdiction, as trustee of property which is situate out of the jurisdiction. If such service were allowed, a foreigner might always be brought over to the English Courts in respect of foreign property by the simple device of effecting a mortgage of the property and making the mortgagees defendants.

Muir Mackenzie, for the trustee in bankruptcy :—

The omission of the word "concurrent" on the writ served out of the jurisdiction is at the utmost an irregularity which might be cured by allowing the writ to be served *de novo*.

The same may be said of the omission to serve the English Defendants in case the Court should think that the decision of *Pearson*, J., in *Yorkshire Tannery and Boot Manufactory* v. *Eglinton Chemical Company* (1) ought to be followed. Having regard to the observations made on that case in *Tassell* v. *Hallen* (2), it is submitted that it ought to be disregarded as an authority : see the observations of Lord *Coleridge*, C.J. (3)

Order XI., rule 4, is sufficiently complied with if the Judge to

(1) 54 L. J. (Ch.) 81. (2) [1892] 1 Q. B. 321.
(3) [1892] 1 Q. B. 324.

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whom the application for leave to serve out of the jurisdiction is made can see that there is a sufficient cause of action; it is not necessary that the affidavit in support of the application should traverse the exact words of Order XI.

The Plaintiff does not admit that the testator was domiciled in *Canada*. He was an officer in the British Army, and died in this country. The cause of action against the Defendant *Robinson* is perfectly clear. The account sought against him is not a matter of complication; all that is required is that he should realize the share of the bankrupt as beneficiary under the will, pay the amount due to the mortgagees in this country, and pay the balance to the trustee in bankruptcy. He is the trustee in whose hands are the only funds which are available for the redemption of the mortgages, and he is therefore a necessary and proper party to this action for redemption.

KEKEWICH, J.:—

It is mere repetition of what has been said by other Judges, and especially by Mr. Justice *Chitty*, to say that questions of service out of the jurisdiction are of essential importance, and that notwithstanding that a Judge has made an order for such service, the question whether the writ ought to have been so served or not is open to review on argument on an application by the party concerned. Speaking for myself, I do my best, as Mr. Justice *Chitty*, in the case referred to, stated that he did, to examine these matters narrowly (1). They are laid before me by my Chief Clerk without his personal intervention, and I consider them at convenient opportunities, declining as a rule to submit to the pressure which sometimes is applied by the parties or their solicitors, who perhaps desire to send out the writ by the next mail, or otherwise are more or less in a hurry. My rule is to look through the affidavit or affidavits to see that one or more of the cases mentioned in the several rules of Order XI. is fairly met. Generally, I require that the affidavit should be in conformity with the very words of the rule; but if the substance is there, I sometimes, though not without hesitation, do not insist upon exact compliance

(1) See *In re Burland's Trade Mark*, 41 Ch. D. 542, 545.

with the language of the rule. Here, to my mind, there were omissions of substance, and how they were overlooked I do not pretend to be able to remember. Probably some explanation occurred to me then which at the present moment I cannot recall. In the affidavit made by the Plaintiff *Collins* in support of the application for leave to issue the concurrent writ, there is a statement that the Defendant *Robinson* is a British subject; so far the order has been complied with. There is not a statement, as there ought to have been, that in the belief of the deponent—the Plaintiff or his solicitor—the Defendant is a necessary or proper party to the action. I cannot now conceive why this was not taken as an objection to the order, or why further evidence was not required; and the same may be said of the omission of any statement, that the Plaintiff had according to his advice and belief a good and sufficient cause of action against the Defendant. But, fortunately, the practice does not make the slip of a Judge irrevocable, and now that I have an opportunity, on fuller and better materials, of going into the matter, I propose to consider, as if it were now for the first time before me, the question whether this Defendant ought to be served out of the jurisdiction or not. Before doing that, I desire to notice the more technical objections. They are in truth not merely technical, inasmuch as they are grounded on provisions in the Rules of Court which have been made with the view of preventing service out of the jurisdiction of process which ought not to be so served, or which if served might be of a harassing character to persons resident out of the jurisdiction. In the first place, there is a technical objection that the copy of the writ served on the Defendant out of the jurisdiction was not marked as "concurrent," and that is a slip which, if it had been a matter of importance, would have prevented the service being good. The order was for the issue of a concurrent writ, and a concurrent writ was issued, but unfortunately a concurrent writ was not served, that is to say, a writ marked as concurrent. What purported to be a copy was not in truth a copy.

Then comes the question whether, assuming the Defendant *Robinson* to be a necessary or proper party to the action under Order XI., rule 1 (*g*), he can be properly served out of the

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jurisdiction as being a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction. The meaning of that clause was carefully considered by *Pearson*, J., in the case of *Yorkshire Tannery and Boot Manufactory* v. *Eglinton Chemical Company* (1), and he came to the conclusion that the other party to the action upon the service on whom the propriety of the service out of the jurisdiction depends, must have been served before the Court can allow service on the party out of the jurisdiction. That, so far as I am aware, has always been held to be the meaning of the rule, except that some doubt was thrown upon it in the case of *Tassell* v. *Hallen* (2). It would be presumptuous on my part to criticise the language of the late Lord Chief Justice; but there is no occasion to do anything of the kind, because his Lordship took pains to shew, that though he was not satisfied with the conclusion of *Pearson*, J., he was not then sure that that conclusion was wrong, and Mr. Justice *Collins*, who sat with him and was the only other Judge present, did not adopt the criticism of the Lord Chief Justice, but did adopt the reasoning of *Pearson*, J. There again, therefore, there was an error of a technical character, not unimportant, but still one which might now be set right, if I thought fit to do so, by again allowing service of a concurrent writ out of the jurisdiction, that is, beginning *de novo*.

I then come to the question whether this is a case in which service of the writ out of the jurisdiction ought to be allowed. That depends entirely on Order XI., rule 1 (*g*). Is *Robinson* a necessary or proper party to the action against the *North British and Mercantile Insurance Company*? As regards them, now that he offers to redeem them, no doubt the Plaintiff has a right to maintain the action. About the substance of the action I say nothing; but in point of form, at any rate, he is technically right and shews a good cause of action against them. The writ is so far perfectly in order and straightforward. Can he properly join the Defendant *Robinson* as co-Defendant because he is a necessary and proper party to "the action"? Those words must refer to the action to which the Defendant is a necessary

(1) 54 L. J. (Ch.) 81. (2) [1892] 1 Q. B. 321.

and proper party, not to another action, and you cannot make it the same action by putting it into the same writ. It cannot be the meaning of the rule that you can make *A.* and *B.* parties and ask one relief against *A.* and another against *B.*, and say because you have a good cause of action against *A.*, therefore you can join *B.*, who is a party out of the jurisdiction, seeking relief against him on another cause of action against him. That cannot have been intended. Nor do I wish it to be understood that I think that the Plaintiff must ask the same relief against the two parties; but I think the kinds of relief sought must, within the ordinary course of practice, be connected together. The principle seems to me to be contained in the case of *Witted* v. *Galbraith* (1), which was very much discussed. You must have, as Lord Justice *Lindley* said, "a *bonâ fide* case of an action properly brought against a person who has been served within the jurisdiction," and not an action brought against such person simply to enable the Plaintiff to bring in other Defendants who are to be served out of the jurisdiction. The case against the *North British and Mercantile Insurance Company* is one to redeem their mortgage. The Defendant *Robinson* has no connection with that at all. What is sought against him is to administer the estate of which he is trustee, and to make the estate liable in his hands to provide the money necessary to redeem the insurance company, and for that purpose to take the accounts between the Plaintiff and the Defendant *Robinson*. That is an entirely different action—an action which, as at present advised, I think the Plaintiff can well maintain. He seems to have a perfect right to maintain an action against the Defendant *Robinson*, but not in this Court, not here where *Robinson* is not, but in *Canada* where he is, and I am asked to bring the Defendant *Robinson* over here where he neither personally resides nor, according to his affidavit, which is of course uncontradicted, has any of his trust estate, that I may join him as a party to the action against the insurance company. It really is a case of two actions rolled into one, in order to make two sets of Defendants to one action. It is not a *bonâ fide* claim against *Robinson* in connection with an action against the

(1) [1893] 1 Q. B. 577.

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insurance company, any more than a *bonâ fide* claim against the insurance company in connection with an action against *Robinson*. Two such separate actions ought not to have been combined, if I may venture to say so, according to ordinary rules of pleading and practice, and certainly, in my judgment, cannot properly be combined for the purpose of bringing in a party out of the jurisdiction who cannot otherwise be properly made liable to the process of this Court.

Solicitor for the Plaintiff: *Ralph Raphael.*
Solicitors for the Defendant *Robinson*: *Jordan & Davies.*

C. C. M. D.

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[1894 R. 699.]

Costs—Taxation—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44)—*General Order under the Act, rr.* 2, 4; *Sched. I., Part I.—Purchase and Sub-sale—"Completing" Conveyance—Charge for Preparation of Plan.*

Purchasers of land for £2550 employed a solicitor to act for them. The solicitor perused the contract on their behalf, received from the purchasers an abstract of title, and duly investigated the same. After the title had been investigated the purchasers sold part of the land to a sub-purchaser for £1800, and the solicitor, at their request, prepared the contract with the sub-purchaser, and delivered to his solicitor an abstract of title, consisting of the abstract furnished by the vendors, together with a statement of the equitable title of the purchasers. The transaction was carried out by two conveyances—one by the vendors by the direction of the purchasers of part of the land to the sub-purchaser in consideration of £1800, and the other by the vendors direct to the purchasers of the rest of the land in consideration of £750. The solicitor delivered two bills of costs, charging in one a scale fee under the *Solicitors' Remuneration Act*, 1881, on a purchase by his clients for £2550, and in the other a scale fee on a sale by his clients for £1800. On taxation a scale fee was allowed only in respect of a contract for £750. On summons to review the taxation:—

Held, that the conveyance to the sub-purchaser was substantially a conveyance by the vendors to the purchasers, that the solicitor had done all that was necessary for the completion of a conveyance under the original contract for £2550, and that he was entitled to two scale fees—one on a purchase by his clients for £2550, and the other on a sale by his clients for £1800.

In re Lacey & Son (1) distinguished.

One of the bills of costs included, amongst "disbursements," an item of

(1) 25 Ch. D. 301.

10*s.* for law-stationer's charges for the preparation of a plan indorsed on one of the deeds. The plan was a copy of one already in existence, and the preparation of it did not require the skilled labour of a surveyor:—

Held, that this charge was covered by the scale fee, and was rightly disallowed on taxation.

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ADJOURNED SUMMONS.

On the 1st of December, 1893, *Edward Bulman* and *Daniel Crye* contracted with the *Old England Building Society* for the purchase from the society of land and hereditaments at *New Brighton, Cheshire*, for £2550. Messrs. *Bulman & Crye* employed Mr. *Joseph Frederick Read* to act as their solicitor in the matter of the purchase, and the contract of sale was perused and settled by *Read*, and the execution thereof by the society was obtained by him.

An abstract of the title of the vendors was received by *Read*, as solicitor to *Bulman & Crye*, and compared with the deeds and documents; and he duly sent in requisitions to the vendors, and received replies thereto.

On the 20th of December, 1893, after the title had been investigated and the replies to the requisitions received, *Bulman & Crye* entered into a contract with *Robert Pruddah* for a sale of part of the land to him for £1800. At the request of *Bulman & Crye*, *Read* prepared the contract for sale to *Pruddah*. One of the conditions in the contract was that an abstract of title should be delivered within a specified time. Accordingly a copy of the abstract which had been delivered to *Read* by the solicitors of the vendors was made, and appended thereto was the following statement: "Messrs. *Bulman & Crye* (the applicants) have contracted with the society for the purchase of (*inter alia*) the property contracted to be sold to Mr. *Pruddah*"; and this abstract was duly delivered by *Read* to the solicitor of *Pruddah*.

The transaction was carried out by two deeds of conveyance, dated respectively the 6th of March, 1894, and the 8th of March, 1894. By one of these deeds, made between the *Building Society* of the first part, *Bulman & Crye* of the second part, and *Pruddah* of the third part, in consideration of £1800 paid to the society, the society, by the direction of *Bulman & Crye*, conveyed to *Pruddah* the land which had been sold to him. By the other

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deed, made between the society of the one part and *Bulman & Crye* of the other part, after recitals (*inter alia*) of the conveyance to *Pruddah*, the payment of the £1800 to the society, and that the residue of the purchase-money payable to the society was £750, the society, in consideration of £750 paid to them, conveyed the rest of the land to *Bulman & Crye*.

The conveyance to *Bulman & Crye* was prepared by *Read*. The conveyance to *Pruddah* was prepared by *Pruddah's* solicitor, but the draft was duly sent to *Read*, and perused and considered by him as solicitor for *Bulman & Crye*.

Read delivered to *Bulman & Crye* two bills of costs, one for a scale fee according to the *Solicitors' Remuneration Act*, 1881, and Sched. I. to the General Order thereunder, of £31 10*s.*, in respect of a sale by the building society to *Bulman & Crye* for £2550, and the other for a like scale fee of £23 in respect of a sale by *Bulman & Crye* to *Pruddah* for £1800.

The first-mentioned bill of costs contained also some items of disbursements, bringing up the total amount to £35 5*s.* 6*d.* One of these items was as follows: "Paid Law Stationer's charges for plan, 10 shillings."

Bulman & Crye obtained an order for taxation of these bills The taxation took place in the *Liverpool* District Registry before one of the registrars, and he disallowed the scale fee on the second bill altogether, and allowed a scale fee on the first bill in respect of £750 only, on the ground that *Read* had only completed a conveyance for that amount of purchase-money. He also disallowed the charge for a plan, considering that it was covered by the scale fee.

Read carried in objections to the taxation. His objection to the disallowance of the scale fees was as follows:—

"My grounds of objection are (1.) that I was, at the date of investigating the title, responsible for a title of the value of £2550, and my clients had not then contracted for the sale of any portion of the land to Mr. *Pruddah*.

"(2.) That by sect. 4 of the *Solicitors' Remuneration Act*, 1881, the principles upon which general orders regulating the mode of remuneration are to be prescribed are (amongst other things) 'The amount of the capital money to which the business related. The

skill, labour, and responsibility involved therein, on the part of the solicitor, and the number and importance of the documents prepared.' . . . (3.) That the sale in the present case was completed within the meaning of clause 2 (*a*) of the General Order made in pursuance of the *Solicitors' Remuneration Act*, 1881, and that, therefore, Part I. of Sched. I. to that order applies to the whole purchase-money. (4.) That the investigating scale is applicable where a solicitor has perused and completed contract, investigated title, and prepared and completed conveyance. (5.) In the alternative, I say that if I am not entitled to the scale fee for investigating, then by clause 2 (*c*) of the said General Order I am entitled to a remuneration to be regulated according to the present system as altered by Sched. II. to the same order."

The reply of the Registrar to this objection was as follows:—

"It seems to me that the question turns upon the meaning to be attached to the word 'completed' in the General Order under the *Solicitors' Remuneration Act*. Under Order 2 (*a*) the scale fee given in Sched. I. is to apply to sales, purchases, and mortgages completed. The argument that because the amount of the purchase-money in the contract is £2550, therefore a scale fee must be allowed on that amount is not, to my mind, a sound one. The Court of Appeal, in *In re Lacey & Son* (1), has clearly laid down that the scale fee can only be charged 'where substantially the whole of the work mentioned, *i.e.*, deducing title and perusing and completing the conveyance, is done.' Can it in this case be fairly said that the solicitor has perused and completed a conveyance of £2550?

"I assume from the wording of this objection that it is contended that the conveyance to Messrs. *Bulman & Crye* for £750, and the conveyance to Mr. *Robert Pruddah* for £1800, must be taken together to constitute the completion of the contract for £2550. It is true that on the completion of these two conveyances Messrs. *Bulman & Crye* had fulfilled all the obligations they incurred by agreeing to purchase the property for £2550; but if it is held that on this account the solicitor is entitled to charge the full scale fee as having himself perused the contract,

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investigated the title, and perused and completed the conveyance for £2550, we should have the remarkable result that he is also in addition entitled to charge his clients for preparing the contract and completing the sale of their interest to Mr. *Pruddah*, while Mr. *Pruddah's* solicitors are also entitled to charge their client for investigating the title and preparing and completing the conveyance. I cannot think that this is the result contemplated by the Remuneration Order. Sched. I. cannot be intended to apply where the contract is only carried out by means of two conveyances to two purchasers acting by different solicitors. The terms of Order 2 are applicable to such a case as this. According to sub-sect. (*a*) the scale charge ought to be calculated on a purchase-money of £750, that being the amount of the purchase-money for which Messrs. *Bulman & Crye's* purchase was completed. Sub-sect. (*c*) provides that 'in respect of business not hereinbefore provided for connected with any transaction, the remuneration for which, if completed, is hereinbefore or in Sched. I. hereto prescribed, but which is not in fact completed .... the remuneration is to be regulated according to the present system as altered by Sched. II. hereto.' On the taxation of the costs I stated that if there had been any investigation of title relating solely to the land, the conveyance of which was not taken up by Messrs. *Bulman & Crye*, or if there had been negotiations or other work done which the solicitor could shew would not have been necessary if the original contract had only been for the purchase of the land included in the conveyance, then the solicitor would be entitled to charge under this sub-section according to Sched. II. for the work done. I accordingly gave him an opportunity of bringing in a bill of costs to be taxed upon that footing. The bill of costs mentioned in the objection, which has been allowed at £15 2*s.* 4*d.*, includes several charges made out on this footing which I have allowed."

The objection of *Read* to the disallowance of the charge for the plan was as follows:—

"At the time of making out my bills of costs I had not my law stationer's charges before me, and the item of 10*s.* was an estimated amount; but I have been charged and have produced

to the registrar a voucher for the sum of 15*s.* actually paid by me for having the plan endorsed on the conveyance.

"This item has been disallowed on the ground that it is covered by the scale, and my reason of objection is that the scale does not include whatever is actually paid for endorsing plans whether done by a land surveyor or by a law stationer."

The Registrar's reply was as follows:—

"I have disallowed this item, as I am of opinion that by clause 4 of the Solicitors' Remuneration Order, it is included in the scale charge which 'shall include law stationers' charges, and allowances for time of the solicitor and his clerks, and for copying and parchment, and all other similar disbursements.'

"The copying of a plan on to the conveyance is a proper 'law stationer's charge,' as it is not work which would necessitate the employment of a surveyor, and I think it is clearly covered by the scale."

Read took out a summons to review the taxation. The summons was adjourned into Court, and now came on for hearing. The two questions as to the disallowance of the scale fee, and as to the disallowance of the charge for the plan, were separately and successively argued.

Warmington, Q.C., and *P. O. Lawrence*, in support of the summons:—

We submit that the Applicant is entitled under the *Solicitors' Remuneration Act*, 1881, and the General Order thereunder, to two scale fees—one on a purchase by his clients for £2550, and the other on a sale by them for £1800. The Registrar has allowed a scale fee only in respect of a contract for £750; that is, he has invented a contract which never had any existence at all. The only contract for purchase entered into by the clients of the Applicant, and therefore the only contract for purchase under which he acted for them, was that for £2550. If a man comes to a solicitor and says, "I am going to buy a property for £2550. Will you act for me?" and the solicitor says "Yes," both parties are from that moment bound by the scale. The client cannot afterwards be permitted to say to the solicitor, "I have sold all

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the property but a small part, worth £100, and therefore you shall only have the scale fee on £100." The Registrar has held that the Applicant is not entitled to a scale fee on £2550, because he has only "completed" a conveyance for £750; but that is a fallacy. The whole property comprised in the contract for £2550 has been conveyed to the clients or their nominees, and the solicitor has acted for them as purchasers in respect of the conveyance of the whole. The conveyance to *Pruddah* by the vendors with the consent of the purchasers was merely a compendious way, adopted no doubt with a view to the diminution of the stamp duty, of effecting two conveyances, one by the vendors to the purchasers, and the other by the purchasers to *Pruddah* as sub-purchaser.

[KEKEWICH, J.:—There was no reason except convenience why the transaction should not have been carried through by two conveyances—one a conveyance of the whole property to the purchasers for £2550, and the other a conveyance of part by the purchasers to *Pruddah* for £1800.]

Exactly so; and if that course had been adopted no question could have been raised.

[KEKEWICH, J.:—The purchase-money might have been raised by mortgage, and the mortgage effected by an independent deed.]

In that case the latter deed would have fulfilled two offices. It would have completed the purchase, and it would also have completed the mortgage. *In re Lacey & Son* (1) is really in our favour, for the Court of Appeal in that case said that there must be a "substantial" completion—that is, a completion in substance, not *modo et formâ* according to the contract.

If the Applicant is not entitled to a scale fee on £2550, then the scale fee is not applicable at all, because there never was any contract for such a sum as £750, and therefore the case falls within rule 2 (*c*) of the General Order, and the remuneration must be regulated according to the present system as altered by Sched. II.

But we submit that the case stands on exactly the same

(1) 25 Ch. D. 301.

footing, so far as the solicitor is concerned, as if there had been a conveyance to the purchasers and from the purchasers to the sub-purchaser on the same day. In that case both contracts would have been fulfilled according to their actual words. The sole difference between that case and this is that there would then have been an additional payment to the revenue by way of stamp duty.

O. L. Clare, for the Respondents *Bulman & Crye*, the purchasers:—

The solicitor in this case has brought in a bill charging the whole scale fee on £2550—that is, as though he had completed a contract for that sum by means of a conveyance to the purchasers prepared and completed by him. He has also brought in another bill charging the whole scale fee on a sale to the sub-purchaser for £1800—that is, on the footing that he has deduced title and perused and completed a conveyance under a contract for that sum; but in truth he has not completed a conveyance to the purchasers for £2550, but only for £750, and he has not deduced any title to the sub-purchaser, because no deduction of title was required. If the contract had been completed so as to make it clear that the scale fee was applicable, the solicitor would have prepared one more deed than he has in fact prepared. The sale for £2550 was a transaction which has not in fact been completed by the solicitor, and which therefore is within rule 2 (*c*) of the General Order. Suppose property was purchased under an open contract, and that when the title was investigated the purchaser's solicitor found that the title was bad, it is quite clear that in that case he would not be entitled to the scale fee, and the case would fall within rule 2 (*c*). If, instead of the contract going off, the parties had come together, and it had been agreed that the purchaser should purchase half the land only, the purchaser's solicitor would only have been entitled to the scale fee on one-half, and a *quantum meruit* on the other part, or else the scale fee would not be applicable at all, and the solicitor must bring in a fresh bill. *In re Lacey & Son* (1) shews clearly that in order to entitle the

(1) 25 Ch. D. 301.

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solicitor of a purchaser to the scale fee he must have done three things: (1.) perused and completed the contract, if any; (2.) investigated the title; and (3.) prepared and completed the conveyance. Similarly, in order to entitle a vendor's solicitor to the scale fee he must have (1.) prepared the contract, if any, (2.) deduced title, and (3.) perused and completed conveyance. Here the solicitor never prepared and completed a conveyance for £2550; therefore he is not entitled to the scale fee on that sum. Similarly, he has never deduced title to property sold for £1800; and therefore he is not entitled to the scale fee on that sum. But he has completed a conveyance for £750, and he is entitled to the scale fee on that sum, and on that sum only.

KEKEWICH, J.:—

There might be some convenience in laying down a general rule applicable to other cases similar to the present one, and as the argument proceeded there was some temptation to do so; but I desire to observe the general rule, and to limit my decision to the particular facts before me. The case is simple enough. The vendors sold for £2550 property in bulk. Before the completion of their purchase the purchasers sold a part of the property for £1800, and the purchase was completed by two deeds, which may be treated as contemporaneous, though, as a matter of fact, some forty-eight hours divided their dates. By one conveyance, the property which had been resold was conveyed to the new purchaser or sub-purchaser for £1800, that amount being paid to the vendors, and they conveying direct to the sub-purchaser by the direction of the purchasers from them, who were necessarily parties to the conveyance. The balance of £750 was also paid directly to the vendors; but as regards that part of the property, the conveyance was taken to the original purchasers, there having been no sub-purchase. It seems to me that the whole question of substance really is whether the conveyance of the first-mentioned property to the sub-purchaser was a conveyance by the original vendors to the original purchaser, and, to my mind, there is no doubt that it was. A purchaser is entitled, subject to certain limitations on the score of extra expense, which will be found referred to in the well-known judgment

of Sir *George Jessel* in *Earl of Egmont* v. *Smith* (1) to have the property conveyed as he pleases, and to whom he pleases; so long as he does not increase the burden cast upon the original vendor, he may have it in any number of lots, and to any number of persons; and as each lot is conveyed to each separate person there is, I apprehend, a conveyance directly by the vendor to the original purchaser, notwithstanding that the estate may be vested in some person claiming under a sub-purchase. The result is, that the whole original purchase-money of £2550 is found by the original purchasers, and the completion is in pursuance of the original contract. It is not that the new purchaser or sub-purchaser steps into the shoes of the original purchaser by the assignment of the contract; but, as Mr. *Warmington* pointed out, there is an independent contract between the purchasers and the sub-purchaser carrying with it the liability to an action for specific performance with all its consequences. They are independent vendors in every sense of the word. Supposing the transaction had been carried out, as it very well might have been, by a separate conveyance from the purchasers to the sub-purchaser, that is, by the property being conveyed by one or two deeds to the original purchasers and the original purchasers then conveying to the sub-purchaser. There could be no question about that at all. The difference in mode is a difference in form and not in substance. Both sides rely on the case of *In re Lacey & Son* (2). The observation to be made upon that case is, that there it was part of the original contract that there should be no abstract of title, and the result was that the Lords Justices in effect said, "You have not deduced title, because there was no title to deduce; and therefore you cannot charge under the schedule for deducing title and other things, because though you have done the other things you have not deduced the title." But here the solicitor's contract with the client, by which he was bound if he accepted the retainer, was to do whatever was necessary to attain the completion of the conveyance. He has done whatever was necessary for the completion of the conveyance; he has in substance carried it through to the end. As it happens, his clients have not

(1) 6 Ch. D. 469. (2) 25 Ch. D. 301.

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required him to actually prepare with his own hands the conveyance to the sub-purchaser, because, according to custom, the sub-purchaser prepared his own conveyance; but his clients were parties to the conveyance, and he had to peruse it and see that it was a proper conveyance by them to the sub-purchaser, not only by the original vendors, but by his own clients; and though in one sense he did not prepare it, I think in substance he did; and, so far as he was relieved from doing so, he was only relieved by his clients desiring him to do it in a particular way. I think, in substance, he has completed it from beginning to end, and I observe that, in *In re Lacey & Son* (1), all the Lords Justices intimate that where you see the work is in substance done, the remuneration follows. I think that the solicitor is entitled to the scale fee for a purchase by his clients at the price of £2550. I think there was an independent contract for a sale to *Pruddah* for £1800, and that the solicitor is also entitled to a scale fee on that amount for his clients as vendors. It is said that he did not make out a title. It seems to me that he did He made out the only title he could. He used the abstract delivered by the original vendors, and added to that the equitable title of his clients. He could make out no other title. Fortunately for him, it was an easy matter; but the scale proceeds, as I think, on the footing that the solicitor must take the rough with the smooth: sometimes he has an easy job, sometimes a difficult one; sometimes it is an easy job with a large purchase-money, and sometimes a difficult job with a small purchase-money. That is the principle under the Act and Rules, and I do not see why the solicitor should not be paid for both transactions because he happens to have earned the fee without much difficulty to himself. If in the case of the sale to *Pruddah* there had been any contract which prevented the delivery of an abstract, then the case would have come within *In re Lacey & Son*, and therefore there would have been no scale fee for deducing title, and therefore no scale fee at all. But unless the solicitor is stopped by something in the contract, he is bound to deduce the title, notwithstanding that he has the materials under his hand. No doubt he may simply

(1) 25 Ch. D. 301.

have to copy the old abstract; but that does not absolve him from making out the title. I hold, therefore, that two scale fees are payable.

The question as to the charge for the plan was then argued. It was admitted that this plan was merely a copy of one already in existence, and that the preparation of it did not require the skilled labour of a surveyor.

Warmington, Q.C., and *P. O. Lawrence*:—

The charge for the plan is for a "disbursement" reasonably and properly paid by the solicitor within the meaning of rule 4 of the General Order, and therefore not covered by the scale fee. It is not a mere law stationer's charge, which, by the same rule, is to be included in the scale fee, because something more than law stationer's work is required in order to produce an accurate plan which is not a mere writing, and which is of no value unless it is accurately drawn. No doubt this plan was an easy one to copy; but if it were to be decided that a charge for a plan comes within the scale fee, such a decision would extend to cases where plans are intricate and difficult, and far beyond the powers of any law stationer to prepare. [They referred to the Digest to the *Solicitors' Remuneration Act* and Order (1).]

O. L. Clare was not called upon.

KEKEWICH, J.:—

Here, again, I will confine my decision to the case before me. In this case it seems that all that was done was to copy on the first skin of the deed a plan which was already prepared to hand, and the copying of which did not require—I will not say skilled labour, but the skilled labour of a surveyor. Whether the plan was on the original contract, also, I do not know; probably it was only on the conveyance, though, in modern practice—particularly in the case of building land—it is very frequently found on the contract. I do not know how much I ought to know beyond that which is before me, but I do know

(1) Vol. i. p. 133, par. 344.

KEKEWICH, J. 1894 *In re* READ.

that law stationers copy such plans as a matter of course, and that sometimes they are prepared in the solicitor's office. In this case the charge for the plan seems to me to come strictly within law stationer's charges, and within the scale. If it is necessary to employ a surveyor, and a surveyor is employed, then the charge does not come within the scale. But speaking for myself, I should first inquire whether there was any necessity to employ a surveyor, and I should not look with favour on the employment of a surveyor with the view of increasing costs.

Solicitors: *J. F. Read, Liverpool; F. Venn & Co.*, agents for *Thomas Etty, Liverpool.*

C. C. M. D.

KEKEWICH, J. 1894 *June* 28.

In re BUTLER. LE BAS *v.* HERBERT.

[1891 B. 1258.]

Will—Marshalling—Order of Administration of Assets—Specific Devises and Bequests—Charge of Debts on Real Estate—General Direction for Payment of Debts—Stock specifically bequeathed charged by Testator in his Lifetime.

Where the general personal estate of a testator not specifically bequeathed is insufficient for payment of his debts, a specific legatee of property charged by the testator in his lifetime with the payment of a sum of money must, as between such specific legatee and other specific legatees or devisees, bear the burden of the incumbrance; and a general direction in the will that the testator's debts shall be paid after his decease is not sufficient to throw any part of such burden on the specific devisees of real estate.

In re Bate (1) considered.

MARY BUTLER made her will, dated the 18th of September, 1889, and thereby proceeded as follows: "I appoint my two sisters, *Katherine Jane Le Bas* and *Emilie Constance West*, to be my executors, and direct that all my just debts and funeral and testamentary expenses shall be paid as soon as conveniently may be after my decease." The testatrix then proceeded to devise a house, farm, and cottages, known as *Bradshot Hall*, "and all as it stands," to her said sisters upon certain trusts for the benefit

(1) 43 Ch. D. 600.

of her nephew *Robert William Herbert*, a farm in *Cumberland* called *Low Leathes* to her sister *Emilie Constance West* absolutely, and all her "invested money" to her sister *Emilie Constance West* for her life, and at her death to be divided between the testatrix's nephews, *William Edgar Tindal Williams* and *Alan Percival Williams*, and her niece, *Rose Herbert*, and concluded by making specific bequests of certain trinkets, and empowering her sisters to take any piece of furniture they fancied from *Bradshot*.

The testatrix died on the 23rd of May, 1890, and her will was proved on the 9th of July, 1890.

The testatrix at the time of her death was possessed, amongst other stocks, shares and securities, of a sum of £1000 *Great Indian Peninsular Railway Company* Capital Stock, which was held by her bankers as security for a loan to her of £1200, and an overdraft by her on current account to the amount of £413 0*s.* 1*d.*

This action was commenced by originating summons by the executors, *Katherine Jane Le Bas* and *Emilie Constance West*, as Plaintiffs, against the persons interested in the gifts above specified, and other beneficiaries, as Defendants, asking for the determination of several questions arising under the will, and in particular "if the personal estate of the testatrix not specifically bequeathed was insufficient for the payment of her debts and funeral and testamentary expenses, out of what property of the testatrix and in what proportions the deficiency was to be made good, and how the same ought to be raised."

By an order made in the action on the 1st of July, 1891, it was declared that the gift contained in the will of the house and farm known as *Bradshot Hall*, "and all as it stands," included the furniture and effects and the live and dead stock and other effects on the farm; and by another order, made on the 28th of April, 1892, it was declared that the stocks, shares, and securities belonging to the testatrix, including the £1000 *Great Indian Peninsular Railway Company* Capital Stock, passed under the bequest of "all invested money" above stated, and it was also declared that the charge created by the testatrix on the last-mentioned stock was payable out of her general personal estate.

It subsequently appeared that the general personal estate of

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the testatrix was insufficient for the payment of the amount due to the bankers in addition to her other debts, and the summons again came on to be heard for the determination of the question above stated as to the mode in which the deficiency was to be made good.

Daniel Jones, for the Plaintiffs:—

I submit that the burden of the charge in favour of the bankers of the testatrix ought to be borne by the specific legatee of the stock which was subject to the charge. Where property specifically bequeathed by a testator has been charged by him in his lifetime, other property specifically bequeathed cannot be called upon to contribute to the satisfaction of the charge: *O'Neal* v. *Mead* (1); *Halliwell* v. *Tanner* (2).

[KEKEWICH, J.:—In *Halliwell* v. *Tanner* the Court proceeded upon the direction that the mortgage money should be paid out of the residuary personal estate.]

The direction was only what the general rule of law would have effected, and therefore came to nothing at all.

The only other point is as to the effect of the direction by the testatrix as to payment of her debts. It is a mere general direction, and therefore insufficient to vary the rights of the specific devisees and legatee *inter se* as to the property specifically charged.

Vernon R. Smith, for the Defendant *Robert William Herbert*, adopted the same arguments.

E. Beaumont, for the other Defendants:—

I rely on the doctrine of marshalling, applicable by reason of the direction for payment of debts. The effect of that direction is to throw the debts on the real estate, whether specifically devised or not, and in such a case I submit that, notwithstanding the decision of Lord Justice *Kay*, when Mr. Justice *Kay*, in *In re Bate* (3), the rule is, that the real estate having been charged by virtue of the preliminary direction for payment

(1) 1 P. Wms. 693. (2) 1 Russ. & My. 633.
(3) 43 Ch. D. 600.

of debts ought to be exhausted and applied before the pecuniary legatees are defeated. *In re Bate* (1), the decision in which has been a surprise to the profession, and cannot be regarded as good law, has been considered by Mr. Justice *Stirling* in *Re Stokes* (2), and was treated by him as a case in which marshalling did not apply, and which therefore he was not bound to follow. I do not understand his Lordship to have meant that he should himself have decided that the law as to marshalling was not applicable in a case similar to *In re Bate*, but merely that he must treat that case as one in which that law was not in fact applied. In *Seton* on Judgments (3), where *Re Stokes* and *In re Bate* are both referred to, the order of administration of estates in the payment of debts is stated in the same way as in previous editions, so that the old rule as above stated is treated as not having been altered by *In re Bate*. On the other hand, in *Jarman* on Wills (4) (where, however, *Re Stokes* is not cited), *In re Bate* is treated as altering the rule as to the order of administration by shewing that pecuniary legatees are to be called upon to contribute in priority to devisees of real estate charged with debts.

It is true that the debt now in question was secured to the testatrix's bankers by a charge on this specifically bequeathed property; but nevertheless it was a debt, and the testatrix has, by the direction for payment of debts, charged her real estate with the payment of all her debts. It must be admitted that the result of this argument is a strange one. It may seem strange that specifically devised real estate should exonerate specifically bequeathed personal estate; but it is impossible at the present day to doubt that a general direction for payment of debts charges the debts on the real estate. The cases of *O'Neal* v. *Mead* (5) and *Halliwell* v. *Tanner* (6) have therefore no application, because we have here, by reason of the direction for payment of debts, that "denotation of intention" that the debts shall be borne by the realty which is referred to by Lord *Eldon* in *Aldrich* v. *Cooper* (7).

(1) 43 Ch. D. 600.
(2) 67 L. T. (N.S.) 223.
(3) 5th Ed. vol. ii. p. 1406.
(4) 5th Ed. vol. ii. p. 1430.
(5) 1 P. Wms. 693.
(6) 1 Russ. & My. 633.
(7) 8 Ves. 382, 397.

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[KEKEWICH, J.:—*O'Neal* v. *Mead* (1) and *Halliwell* v. *Tanner* (2) proceed on intention on one line; you have a case of intention on another line; the question is on which line I am to travel.]

O'Neal v. *Mead* decided no more than this—that there being no direction in the will as to the estate which was to bear the debts, the heir to whom the mortgaged freeholds were devised should not disappoint the wife, to whom leaseholds were specifically given, by laying the mortgage debt upon her legacy. So as to *Halliwell* v. *Tanner*. There in effect a testator, having three properties, all personal, gave one charged with a debt to *A.*, another to *B.*, and another to *C.*, and superadded a direction that his debts should be paid out of a particular fund. The fund proved to be insufficient, and therefore, in the result, the Court was left without any direction as to the incidence of the debts. I submit that this testatrix (though she may not have reflected as to what would be the consequence of her so doing) has in effect charged her debts on her real estate as fully as if she had said, "I charge all my real estate with the payment of my debts," and the inevitable result (though it may be a strange one) is that she has charged the specifically devised real estate with this debt in exoneration of the specifically bequeathed personal estate.

Daniel Jones, in reply:—

The question is one of intention, and it is clear that a mere direction for payment of debts is not so strong an indication of an intention that they should be borne by the real estate as an express charge of them on the real estate would be. If a testator merely says, "I direct that my debts shall be paid," and then proceeds to give his leaseholds to *A.* and his freeholds to *B.*, he cannot be taken to mean that *B.* is to bear the debts in exoneration of *A.* That must have been the consideration which prevailed with Lord Justice *Kay* in *In re Bate* (3), and he would probably have held exactly the reverse if the real estate had been expressly charged so as to evince an intention on the part of the testator to prefer *A.* over *B.*

(1) 1 P. Wms. 693. (2) 1 Russ. & My. 633.
(3) 43 Ch. D. 600.

[KEKEWICH, J.:—Do you admit that if there is a charge of debts here the case is one for marshalling?]

If there were an express charge the case would undoubtedly be one for marshalling; but I say that as between specific legatees and devisees, where there is a mere constructive charge of debts, there is no case for marshalling. I rely on *In re Bate* (1) as an authority for that. In the case of *Re Stokes* (2), the Court was able to infer from the particular directions in the will an intention that the legatee should have his legacy, even at the expense of the real estate; and when once that conclusion is arrived at there is a case for marshalling. I claim that *In re Bate* is good law, and is in my favour.

But apart from that, here the testatrix in her lifetime has charged particular property with the payment of this debt to her bankers. That makes all the difference. She has by express intention charged the specific legacy with the debt, and that takes the case entirely out of *In re Bate* and *Re Stokes*. A specific devisee is entitled to as much consideration as a specific legatee, and, in the absence of any express indication of intention that the debts should be thrown on the devisee, the intention evinced by the testatrix in her lifetime ought to have effect.

KEKEWICH, J.:—

The authorities concerning the order of application of a testator's property in the payment of his debts, where the general personal estate is insufficient, are, unfortunately, not in a satisfactory state. The case of *In re Bate* was decided by the present Lord Justice *Kay* in 1890, when he was still occupying the place of a Judge of first instance; but one cannot altogether exclude from consideration, when criticising a case decided by a Judge of first instance, the fact that that Judge now occupies a higher position. He seems, on the suggestion of eminent counsel, to have found fault with the statement contained in a standard book known to us as *Seton*, and to have decided contrary to what is said to be known as the current of authority. Since then a new edition of that book has been

(1) 43 Ch. D. 600. (2) 67 L. T. (N.S.) 223.

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published, and I do not understand from it that the learned editors, though altering the language of the book, have substantially altered its teaching. In the order of administration as there stated "general pecuniary legacies" follow after "real estates devised, charged with the payment of debts." There is a distinction drawn between real estates so charged and "real estates specifically appropriated to, not merely charged with, the payment of debts," and there is a further suggested distinction between those charged with the payment of debts and "the case of a mere constructive charge," as in *In re Bate* (1). I am not sure what the editors of *Seton* meant to indicate the law to be, referring as they have done to *In re Bate* as though it was not engrafted on settled rules. I am afraid that my present judgment will not help them in reference to a future edition; but I hope that before the time for that comes we shall have a decision of the Court of Appeal upon the subject. But Mr. Justice *Stirling* has dealt with *In re Bate* in the case of *Re Stokes* (2), and there is a passage in his judgment which requires explanation. He says that Mr. Justice *Kay* did not treat the case before him as a case of marshalling; and he certainly did not: there can, I think, be no doubt about that. But then Mr. Justice *Stirling* said: "It is to be observed that" *In re Bate* "is a case to which the law as to marshalling is not applicable." I think that the interpretation of that passage which Mr. *Beaumont* gave must be the correct one. Mr. Justice *Stirling* did not mean to say that it was a case to which, in his opinion, the law of marshalling was not applicable, but that it was a case in which the law of marshalling was not applied by Mr. Justice *Kay*. I think that the succeeding sentence in Mr. Justice *Stirling's* judgment shews that that must be so. He adds: "Because the Lord Justice, after observing that the statement in *Seton* on Decrees (3) appeared to have originated from some mistake, and arose perhaps from the consideration of some cases in which a charge of debts on the real estate necessitated marshalling, held that the debts and funeral expenses were payable primarily out of the general personal estate not specifically bequeathed. In the present case it appears to me that there is

(1) 43 Ch. D. 600. (2) 67 L. T. (N.S.) 223, 224.
(3) 4th Ed. pp. 989, 990.

a charge of debts which, in the language of the Lord Justice, necessitates marshalling." That language would hardly be consistent with that grammatical accuracy which Mr. Justice *Stirling* uses, if it were intended to mean that he, Mr. Justice *Stirling* thought that the law as to marshalling was not applicable in the case of *In re Bate* (1). He evidently was not anxious to follow *In re Bate*, though in the particular case he did not expressly dissent from it. Then we have also another useful book which is as much in the hands of the profession as *Seton* is, though it does not refer, as that book does, to the authority of *Re Stokes* (2). I refer to the new edition of *Jarman* on Wills (3). There the editor has transposed the order of administration as given in previous editions, and has called attention to the fact that he has done so in deference to *In re Bate*. It used to be "real or personal property devised or bequeathed, charged with debts, and disposed of, subject to such charge," followed by "general pecuniary legacies *pro ratâ*," and now those two have changed places. He refers to *In re Bate* as the authority for that, adopting it as an authoritative decision; and *Re Stokes* is not mentioned, though that case was decided before the book was published. So that the matter is in an unsatisfactory condition; and there I must leave it, because I propose to deal with this case in a manner not contrary to, but not based upon, those authorities.

Mr. *Daniel Jones* has called my attention to two decisions which seem to establish a tolerably plain proposition running counter to the general rule; that is to say, providing for an exceptional case. Let me put that case in a concrete form. A man has two properties, we will say personal estate only. He has some railway debenture stock, and he has a sum of Consols. That is substantially all he has. It matters not whether he has furniture, cash in hand, and so forth, sufficient to meet his funeral expenses. The two items I have mentioned practically constitute the whole of his estate. He gives the railway debenture stock to *A.*, and the Consols to *B.* The railway debenture stock is pledged to his bankers. The result is the legatee of the stock only gets, in the first instance, the stock less the

(1) 43 Ch. D. 600. (2) 67 L. T. (N.S.) 223.
(3) 5th Ed. vol. ii. p. 1430.

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sum charged thereon in favour of the bankers. Can he, according to the general law, throw the burden of the debts on the Consols to this extent, that the Consols shall contribute to the debt to the bankers rateably in proportion to the two values? I think that would be the general law. The debts must be paid out of the personal estate; if there is no general personal estate, they must be paid out of such personal estate as has been specifically bequeathed. And further, the general law is that the legatee of a chattel or other personal estate takes with it the privilege of having any debt charged on it paid out of the personal estate. But the two decisions which have been referred to seem to me to establish an exception in such a case, and on this ground, that it must be the intention of the testator that neither legatee shall be defeated, and that you would defeat the legatee of the Consols in the case I put if you made him pay part of the debt which the testator contracted on the railway debenture stock. That is the argument, as I understand it, in *Halliwell* v. *Tanner* (1); and I also gather the same proposition from the judgments both in *O'Neal* v. *Mead* (2) and *Halliwell* v. *Tanner*, which followed *O'Neal* v. *Mead*. It is a presumed intention, not an intention expressed in so many words, but presumed from the general knowledge of mankind of what it is to be supposed a testator in such special circumstances would be likely to do, there being nothing to shew the intention on the face of the will. That is precisely what I have here. The property is given in such a way that there can be no doubt that the testatrix intended that each legatee or devisee should take his property—the property which is bequeathed or devised to him; and the only indication of intention the other way is the direction that all her just debts and funeral and testamentary expenses should be paid as soon as conveniently might be after her decease. I do not for a moment deny that that may constitute a charge of the debts on the real estate; but looking at it as a matter of intention, it means no more than that her debts shall be paid—paid, that is to say, in a way consistent with the rest of the dispositions of her will; and the rest of the dispositions of her will are governed by the two cases to which I have referred. So treating it as a question

(1) 1 Russ. & My. 633. (2) 1 P. Wms. 693.

of intention, to which I come back, I hold that the property specifically charged to the bankers must bear the burden of that charge. No doubt to that extent the legatee will be defeated by reason of the charge; but the other objects of the testatrix's bounty will have their property as it was intended they should have it, namely, unaffected by this particular debt. Observe that this exception to the general rule only applies where there is an insufficiency of the general personal estate. Both of the decisions depend wholly on the existence of the deficiency.

Solicitors: *Murray, Hutchins, Stirling, & Murray; Barlow & James.*

C. C. M. D.

ROMER, J.

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June 14, 25.

ASTEN *v.* ASTEN.

[1893 A. 1244.]

Will—Specific Devise—Insufficient Description—Intestacy—Election.

If it can be gathered from the words used, that a testator intended to give a particular property to a legatee, but owing to the testator having several properties answering the description in the will, it is impossible to say, either from the will itself, or from extrinsic evidence, which of these several properties the testator referred to, the gift fails for uncertainty, and the Court cannot, to avoid an intestacy, construe the will as giving the legatee the option of electing which property he will take.

Duckmanton v. *Duckmanton* (1) and *Tapley* v. *Eagleton* (2) distinguished.

ROBERT ASTEN, formerly of *Colchester*, who died in October, 1891, being seised of four freehold houses in *Sudeley Place, Colchester*, and having four sons, by his will, made in October, 1888, specifically disposed of the same in the following terms. To his son *George Asten* and his heirs, "All that newly built house, being No. , *Sudeley Place, Cotsfield Road*, with the piece of ground in the rear thereof abutting upon *Rawstorn Road*, all the aforesaid houses and ground being in *Colchester* aforesaid"; to his son, *Robert Nelson Asten*, "All that newly built house, being No. , *Sudeley Place, Cotsfield Road*, with the piece of ground in the rear thereof abutting upon *Rawstorn Road* in *Colchester*." To hold to the said *Robert Nelson Asten* during his life, and, after his death, the testator devised the same to his said trustees upon trusts for the benefit of *Robert Nelson Asten's* wife for her life, and, after her death, if there were no children, upon trust for sale and distribution among his other three sons; to his son *John Thomas Asten*, "All that house, being No. , *Sudeley Place, Cotsfield Road*, together with the piece of ground in the rear thereof abutting upon *Rawstorn Road*, all in *Colchester* aforesaid," to hold to his said son, his heirs and assigns; to his son *Alfred Asten*, "All that house, being No. , *Sudeley Place, Cotsfield Road, Colchester*, aforesaid, together with the piece of ground in the rear thereof abutting upon *Rawstorn Road*," to hold to his said son

(1) 5 H. & N. 219. (2) 12 Ch. D. 683.

and his heirs. The will contained no residuary devise of the testator's real estate.

The four houses in *Sudeley Place* were all built by the testator himself at about the same time, namely, in the summer and autumn of 1888. The piece of ground in the rear of the houses referred to in the will was, at the date thereof and of the testator's death, fenced off from the adjoining land, but was not in any way divided or partitioned between the houses, and was still unbuilt upon.

The four houses were not numbered at the date of the will, nor were they numbered until the spring of 1891. The testator had no other houses in *Sudeley Place* other than the four houses.

The eldest son commenced the present action against his three brothers, claiming a declaration that, upon the true construction of the will, the testator died intestate as to these four houses, and also as to the piece of ground in the rear, and that the four houses and piece of ground descended upon the Plaintiff as heir-at-law of the testator.

The Defendants *Robert Nelson Asten* and *Alfred Asten* admitted the facts as stated in the Plaintiff's statement of claim, and raised only the question of construction; but the Defendant *John Thomas Asten* did not admit the Plaintiff's allegations, and, further, put in a counter-claim charging wilful default against the executors; and the action was consequently set down in the witness list; but the only point raised at the trial which requires any notice in this report was, whether the specific gift of these four houses was, or was not, void for uncertainty.

Neville, Q.C., and *G. Broke Freeman*, for the Plaintiff:—

It cannot be collected on the face of the will that the testator intended that the devisees should have a right to elect, for he devises "all that newly built house, being No. ," not "one of my newly built houses"; consequently the devises are void for uncertainty: *Richardson* v. *Watson* (1); *Boyce* v. *Boyce* (2); *Jarman* on Wills (3). On the face of the will it seems that the testator had selected a house for each of his sons; but he has failed

(1) 4 B. & Ad. 787. (2) 16 Sim. 476.
(3) 5th Ed. vol. i. p. 332.

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to sufficiently indicate which house he intended for the particular son named: these houses are, therefore, undisposed of by the will, and descend on the Plaintiff as heir-at-law.

W. Cowell Davies, for the Defendants *Robert Nelson Asten* and *Alfred Asten*:—

The gift is equivalent to a devise of "a newly built house in *Sudeley Place*" to each son. The specific devisees are therefore entitled to elect, according to the priority of the gifts, which house they will take, and the devise is good, according to the decisions in *Duckmanton* v. *Duckmanton* (1) and *Tapley* v. *Eagleton* (2), which are very like the present case. The testator clearly did not intend to die intestate as to these four houses; and if the legatees are allowed to elect, as was done in the cases I rely on, an intestacy will be avoided.

Hopkinson, Q.C., and *F. Whinney*, for the Defendant *John Thomas Asten*, adopted the same line of argument, and declined o offer any evidence to shew which house the testator intended for each son.

Neville, in reply:—

This case is distinguishable from *Duckmanton* v. *Duckmanton* and *Tapley* v. *Eagleton*, because in those cases it was not possible to say that the testator had selected a particular close in *Ridgway Field*, or two of three particular houses in *King Street*; but here the testator has apparently given a particular house to each son, but the uncertainty as to which is intended renders the devise void.

1894. June 25. ROMER, J.:—

I am sorry that I feel myself obliged to hold that the testator died intestate as to these four houses. The law that is applicable is, I think, clear. A testator who has several properties, all having the same description, may by his will give one of them to a legatee, and leave the choice of that one to the legatee; and such a gift is clearly valid. And the fact that the

(1) 5 H. & N. 219. (2) 12 Ch. D. 683.

legatee is to be able to select may appear either by express words used in the will, or by reasonable inference from it. And, *primâ facie*, if the testator gives one of such properties to a legatee without saying more, then the reasonable inference is, that the testator intended the legatee to select; and this whether the fact appears on the face of the will that the testator had several such properties, as in *Duckmanton* v. *Duckmanton* (1) or whether the fact otherwise appears, as in *Tapley* v. *Eagleton* (2). And I should myself be prepared to hold that, where a testator gives one of such properties to each of several legatees, then he intends (*primâ facie*) to give the right of selection to the legatees according to the priority of the bequests. And this appears to have been the view of *Martin*, B., and *Watson*, B., in the case of *Duckmanton* v. *Duckmanton* (3). But in all these cases it is, of course, essential that the will should not shew that the testator was bequeathing any particular one of the properties to the legatee who desires to select, for the selection by the testator is incompatible with the view that he intended the legatee to select. If a will shews that a testator intends to give a particular property to a legatee, and, owing to the testator having several properties answering the description in the will of the particular property given you are unable to say, either from the will itself or from extrinsic evidence, which of the several properties the testator referred to, then on principle the gift must fail for uncertainty, and the Court cannot, in order to avoid an intestacy, change the will, or construe it as giving to the legatee the option of choosing any one of the properties. This principle was applied in the case of *Richardson* v. *Watson* (4), though whether that case would now be followed on its particular facts may be doubted. The case of *Tapley* v. *Eagleton* does not throw any doubt on this principle, for there Sir *George Jessel* construed the gift by the testator of "two houses" as being equivalent to a gift of "two of my houses." Bearing this principle in view, I will now consider the present will. The testator had four houses in *Sudeley Place*, and the facts as to them are admitted to be accurately stated in the statement of claim. Now, on this will

(1) 5 H. & N. 219.
(2) 12 Ch. D. 683.
(3) 5 H. & N. 223.
(4) 4 B. & Ad. 787.

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I cannot come to the conclusion that the testator intended to give one of these four houses to each son without any selection on the part of the testator. On the contrary, it appears to me clear from the will that what the testator intended was to give a particular house to each son, and not to give any right of selection or election to any son. Owing unfortunately to the houses not being numbered at the date of the will, and their descriptions as given in the will being undistinguishable, I cannot tell from the will which house the testator intended to give to any of the sons. And it is admitted that no extrinsic evidence will supply the deficiency of description, or enable the Court, on inquiry, to ascertain which house was intended by the description of it in the will. I offered to grant such an inquiry, if any, if the sons asked for it; but the offer was refused, and not unnaturally; for the Defendants' contention is that the testator did not intend to describe particular houses, but intended to give one of four to each son, to be chosen by the sons according to the priority of bequest.

Under these circumstances, I cannot remedy the unfortunate state of things, but must declare the bequests void for uncertainty.

Solicitors: *F. & T. Smith & Sons*, agents for *Pope, Marshall, & Potter, Colchester; A. S. C. Doyle*, agents for *Jones & Son, Colchester.*

F. E.

Applied. Re MANDER (*decd.*). [1950] 2 All E.R. 191.

In re LORD STRATHEDEN AND CAMPBELL. ALT *v.* LORD STRATHEDEN AND CAMPBELL.

ROMER, J.
1894
July 5.

[1893 S. 4848.]

Will—Charitable Bequest—Contingent Gift to a Volunteer Corps—Uncertainty—Perpetuity—Validity.

A gift by will for the benefit of a volunteer corps is a charitable bequest.

A testator bequeathed an annuity of £100 to be provided to the *Central London Rangers* (a volunteer corps) on the appointment of the next lieutenant-colonel:—

Held, that the gift was void because it infringed the rule against perpetuities.

WILLIAM LORD STRATHEDEN AND CAMPBELL by his will, dated the 16th of January, 1892, appointed the Defendant and two other persons his executors, and thereby he bequeathed "an annuity of £100 to be provided to the *Central London Rangers* on the appointment of the next lieutenant-colonel."

The testator died on the 21st of January, 1893, and his will was proved by the Defendant alone, who was the sole residuary legatee under the will.

The Plaintiff was the lieutenant-colonel of the 22*nd Middlesex Rifle Volunteer Corps*, otherwise known as "*The Central London Rangers*," which position he held both at the date of the will and of the death of the testator, and the property of the said volunteer corps was vested in him. The Plaintiff claimed a declaration that the said annuity was a valid bequest, and was vested in him as the commanding officer of the said volunteer corps, and that a sufficient part of the testator's estate might be appropriated to provide for the same.

The Defendant, by his statement of defence, alleged that the bequest was void for uncertainty, and also because it infringed the rule against perpetuities.

Neville, Q.C., and *St. J. Clerke*, for the Plaintiff:—

This annuity is vested in the Plaintiff as the present commanding

ROMER, J. officer of the *Central London Rangers*, and he is entitled to have it secured: *Aaron* v. *Aaron* (1).

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Birrell, Q.C., and *Methold*, for the Defendant:—

The first question is, Is this a charitable bequest? There is no case where a gift to volunteers has been held to be a charity. The whole subject, as to what is a charitable purpose, is discussed in *Commissioners for Special Purposes of the Income Tax* v. *Pemsel* (2).

[ROMER, J.:—I think this is a charitable bequest.]

Next, whether the gift is a charity or not, it is contingent on the appointment of the next lieutenant-colonel, and is therefore void for uncertainty, and also because it falls within the rule against perpetuities: *In re Bowen* (3).

[ROMER, J., referred to *Chamberlayne* v. *Brockett* (4).]

There may never be another colonel of this corps, because the Crown may not fill up the appointment when a vacancy occurs, and a mandamus will not lie against the Crown to compel it to fill up the office: *Reg.* v. *Secretary of State for War* (5).

Neville, in reply.

ROMER, J.:—

I am sorry I do not see my way to uphold the validity of this gift. As was pointed out by Lord *Selborne* in *Chamberlayne* v. *Brockett* (6), "If the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*." Applying that to the present case, I look to see, in the first place, Is this gift conditional, and what is the condition?

(1) 9 Hare, 821.
(2) [1891] A. C. 531, 583.
(3) [1893] 2 Ch. 491.
(4) Law Rep. 8 Ch. 206.
(5) [1891] 2 Q. B. 326.
(6) Law Rep. 8 Ch. 211.

ROMER, J.
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Well, unfortunately, it appears to me that it clearly is conditional. The annuity is not to be paid except on the appointment of the next lieutenant-colonel; and if a lieutenant-colonel is not appointed, the annuity is not to commence or be paid. That being so, it being conditional, can I say that the condition must arise within the time that is prescribed by the rules of law against perpetuities? I am sorry to say I cannot. If I could construe it as a gift on the death of the present lieutenant-colonel, the difficulty would be got over; but I do not see my way to construe the will so. It is a gift conditional on the appointment of the next lieutenant-colonel. Now, the next lieutenant-colonel may not be appointed for some time after the death of the present commanding officer; he never may be appointed at all; and, consequently, it appears to me that this is a gift conditional upon an event which transgresses the limit of time prescribed by the rules of law against perpetuities. Therefore, reluctantly, I feel myself bound to hold that this gift fails, and I must dismiss the action, but I do so without costs.

Solicitor for Plaintiff: *J. Perry Godfrey.*
Solicitors for Defendant: *Walters, Deverell & Co.*

H. L. F.

NOYES *v.* PATERSON.

ROMER, J.
1894
June 14; *July* 16.

[1893 N. 1621.]

Vendor and Purchaser—Title—Voluntary Conveyance to Predecessor of Vendor—Repudiation of Contract to Purchase—Specific Performance—13 *Eliz. c.* 5, *s.* 5; 27 *Eliz. c.* 4, *s.* 3.

A person who has contracted to purchase land is not entitled to repudiate his contract simply because one link in the vendor's title consists of a voluntary conveyance to a person under whom the vendor claims by purchase for value.

BY an agreement in writing, dated the 29th of September, 1893, *John George Noyes* agreed to sell, and *Peter Hay Paterson* agreed to purchase a freehold messuage and outbuildings known

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as *Layston Cottage, Buntingford, Herts,* with the pleasure-grounds, orchard, and meadow land appertaining thereto, embracing a total area of about two and a half acres, at the price of £610. The agreement provided for the payment of a deposit of £61 immediately after the signing of the agreement, and that the residue of the purchase-money should be paid on completion of the purchase. The agreement also provided that the purchase should be completed on the 16th of October, 1893, but fixed no time for the delivery of the abstract of title.

The deposit of £61 was paid, but the abstract was not delivered until the 23rd of October, 1893.

In this abstract there was a reference to a voluntary deed, dated in 1884, from *William John Clark* to his wife *Rebecca Clark.* The deed was not abstracted, but was mentioned in one of the abstracted deeds, and it was stated that there was a covenant for its production.

In his requisitions on title the purchaser required that this deed should be abstracted; and on the 1st of November, 1893, he was furnished with a supplemental abstract of it.

By this deed, which was dated the 22nd of August, 1884, and made between *William John Clark,* thereinafter called "the donor," of the one part, and *Rebecca Clark,* his wife, thereinafter called "the donee," of the other part, after reciting that in consideration of the natural love and affection which the donor had for the donee, he had agreed to convey and assign the freehold, leasehold, and personal property thereinafter mentioned to the donee in manner thereinafter mentioned, and reciting that the debts then due from the donor to his various unsecured creditors did not exceed £100, and that particulars thereof were set out in one of the schedules thereunder written, it was witnessed that, in consideration of the natural love and affection which the donor had towards his wife, the donee, and of the sum of 5*s.*, the donor granted to the donee, her heirs and assigns, the above-mentioned (purchased) hereditaments, and another freehold house, to hold the same unto and to the use of the donee, her heirs and assigns, for ever. The deed also assigned to the donee certain leasehold property and furniture; and concluded with a covenant by the donor that the schedule above referred to set

out the whole of his debts (except a debt charged on the leaseholds), and that without the aid of the premises thereby assured the donor had then sufficient assets to pay such debts.

Rebecca Clark held all the title-deeds, at any rate from the date of her husband's death, which occurred on the 25th of December, 1886.

By a conveyance dated the 13th of July, 1888, *Rebecca Clark* conveyed the purchased premises to a man called *Martin* for value, and this deed contained a covenant for production of the voluntary deed; but the other title-deeds of the purchased premises were delivered to *Martin*.

By a deed dated the 17th of January, 1889, *Martin* conveyed the purchased premises to the vendor *Noyes*, on which occasion the title deeds in *Martin's* possession were handed to *Noyes*.

On the 8th of November, 1893, the purchaser's solicitors wrote a letter to the vendor's solicitors, repudiating the contract and demanding a return of the deposit, on the ground that the vendor could not make a good title by reason of the voluntary deed.

The vendor then commenced an action for specific performance of the agreement to purchase, and the purchaser counterclaimed to have the agreement rescinded and his deposit returned.

Oswald, Q.C., and *Boome*, for the Plaintiff:—

The purchaser cannot repudiate his contract on the mere ground that there was a voluntary deed, no claim being set up by *Clark's* creditors. He might have made any requisitions on the subject, but this he did not do. Between the date of the deed and his death, he could, of course, have defeated his wife's title by a conveyance for value; but, having regard to the fact that the title-deeds followed the title, and to the comparatively short time between the date of the deed and the date of the donor's death, and having regard to the lapse of time since, litigation cannot now be reasonably anticipated. The Court does not consider a title too doubtful to force on a purchaser where the probability of litigation against the purchaser is not great, the Court being governed by a moral and not a mathematical

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certainty of a good title: *Fry* on Specific Performance (1); *Spencer* v. *Topham* (2); *Dart's* Vendors and Purchasers (3).

This is not a purchase from the voluntary donee herself, but from a person who purchased for value from her grantee. [They also referred to 13 Eliz. c. 5, s. 5; 27 Eliz. c. 4, s. 3; *Halifax Joint Stock Banking Company* v. *Gledhill* (4); *Smith* v. *Garland* (5); *In re Briggs and Spicer* (6); *In re Brall* (7).]

Neville, Q.C., and *Eve*, for the Defendant:—

The title cannot be forced upon the purchaser; it is too doubtful. The donor may have defeated his voluntary deed by a conveyance for value under 27 Eliz. c. 4. The cases cited on behalf of the Plaintiff are not in point.

Mr. Justice *Stirling* held that the trustees of a voluntary settlement of freeholds could not force the title upon purchasers: *In re Briggs and Spicer.*

Until the trial commenced the Defendant was not aware of *Clark's* death, and that alters the case which it was intended to bring before the Court.

[ROMER, J.:—Practically, the Defendant gets a good title, as it cannot be supposed that a purchaser from *Clark* would have lain by ever since December, 1886.]

The nature of the deed of 1884 should have been stated earlier: *In re Marsh and Earl Granville* (8). The vendor was in default in not delivering a perfect abstract until after the time fixed for completion. At any rate, the purchaser is entitled to make requisitions on the voluntary deed.

ROMER, J.:—

I will not preclude the Defendant from making any requisition as to any sale of this property during Mr. *Clark's* lifetime.

I cannot help seeing that there was an immediate repudiation of the contract directly the circumstances became known as to

(1) 3rd Ed. p. 410.
(2) 22 Beav. 573.
(3) 5th Ed. vol. ii. p. 1101.
(4) [1891] 1 Ch. 31.
(5) 2 Mer. 123.
(6) [1891] 2 Ch. 127.
(7) [1893] 2 Q. B. 381.
(8) 24 Ch. D. 11.

the voluntary deed of gift. The Defendant clearly thought, though in my judgment erroneously, that the mere fact of there having been a voluntary deed justified him in repudiating the contract. He should have investigated the title, and made such requisitions as arose out of the investigation. It is very difficult in a case like this to trace how much of the litigation was due to his having acted on such a view; but, looking at the matter broadly, I think that the costs should be paid by the Defendant up to and including judgment.

There will be judgment for specific performance with a reference as to title in the usual way; but if it is proved to the Defendant's satisfaction that Mr. *Clark* died on the 25th of December, 1886, and did not in the meantime deal with the property, the reference as to title need not be prosecuted.

The counter-claim will be dismissed with costs.

Solicitors for Plaintiff: *Barfield & Barfield.*
Solicitor for Defendant: *John Evans.*

F. E.

WRIGHT, J.

1894

June 28.

In re BREWERY ASSETS CORPORATION.

TRUMAN'S CASE.

[0010 of 1894.]

Company—Shares—Verbal Withdrawal of Application—Notice to Company—Authority of Clerk in Registered Office—Stoppage of Cheque for Application Moneys—Winding-up — Contributory — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 23, 39.

Withdrawal of an application for shares may be made orally before notice of allotment is given.

In the absence of evidence to the contrary, the Court will infer that a clerk in the registered office of a company is, during business hours, and whilst the secretary is absent, so far in charge of the office that he has authority to receive a notice so as to make it a communication to the company.

THE *Brewery Assets Corporation, Limited*, was a company registered under the *Companies Acts*, and having ordinary shares of £10 each.

J. C. Truman, on the 4th of November, 1890, went to the office of the company and there filled up a printed form of application for shares—the application, as completed, being for ten ordinary shares of the company of £10 each, 10*s.* per share being payable on application, and a further sum of £2 10*s.* per share on allotment. *Truman* handed the completed application and his cheque for £30 to a clerk in the office.

Subsequently, but on the same day, *Truman* went again to the office and told a clerk of the company that he withdrew his application for shares, and asked him to return the cheque. The clerk said he could not return the cheque as the secretary was out.

Truman went to the company's office later in the day, but found that it was closed. On the following morning he instructed his bankers to stop payment of the cheque, and they did so.

At a meeting of the directors of the company, held on the 7th of November, 1890, ten shares were allotted to *Truman*; and on the following day he received from the company an allotment

letter, with a banker's receipt in blank for the allotment money annexed. He at once returned the letter and receipt.

In a letter of the 11th of November, 1890, from the secretary of the company to *Truman*, the writer sent back the allotment letter, and stated that the cheque had been sent back marked "Refer to drawer."

The company's bankers' pass-book shewed that the cheque was paid into the company's account on the 4th of November, 1890, and that on the following day the company was debited with the amount of the cheque.

Against *Truman's* name, in the allotment book, there was an entry of the words, "Cheque returned." This book was, in January, 1891, written up by a clerk to the auditors of the company from a list of applicants for shares; but when the application referred to below was made this list was lost, and it was not shewn whether or not a similar entry was made in such list, or whether the directors, when they allotted the shares to *Truman*, knew that his cheque had been returned.

In the register of shareholders *Truman* was credited with £5 and £25, each paid on the 4th of November, 1890, and was debited with £30 for the cheque returned on the 5th of November, 1890. He was also debited with the amount of the first call, which was made in January, 1891.

The company never took proceedings to enforce payment of the application or allotment moneys, or the call.

A resolution for voluntary winding-up was passed on the 2nd of November, 1892, and confirmed as a special resolution on the 30th of November, 1892; and the liquidator placed *Truman's* name on the list of contributories in respect of ten shares.

A summons taken out by *Truman*, for the removal of his name from the list, was adjourned into Court.

J. Tanner, in support of the summons:—

The application for shares was withdrawn before allotment, and it is no objection that the withdrawal was by word of mouth: *Wilson's Case* (1). By sect. 39 of the *Companies Act*, 1862, all communications and notices may be addressed to the registered

(1) 20 L. T. (N.S.) 962.

WRIGHT, J. 1894 TRUMAN'S CASE.

office which the section requires the company to have, and the intention of the Applicant to withdraw his application was communicated to the company by being stated to a clerk in the office. The Applicant's name ought not to have been placed on the list of contributories, as he never agreed to become a shareholder.

Arthur J. Chitty, for the liquidator:—

Merely calling at the office of the company and expressing to a clerk there a desire to withdraw an application for shares is not sufficient to enable the Applicant to escape liability: *Pennell* v. *Stephens* (1). A clerk's duties are merely ministerial, and he is not a person to whom communications of such a nature, intended for the company, can properly be made. A person in the position of the Applicant cannot escape from liability unless he shews either that his notice of withdrawal was in writing addressed to the company, or that the clerk actually did communicate his withdrawal to the company—and no evidence of either fact has been adduced.

The fact that the cheque was stopped is not shewn to have been known to the directors when they allotted the shares, and, anyhow, stopping the cheque was not a communication of the withdrawal of the application of shares, and cannot therefore be relied on. The Applicant, having agreed to take the shares, has under sect. 23 of the Act of 1862 agreed to become a member of the company, and by sect. 37 the register of members is *primâ facie* evidence of such membership. He has taken no steps to have the register rectified.

Tanner, in reply:—

The Applicant has never paid anything, and has always disputed his liability.

WRIGHT, J.:—

I have felt considerable doubt about this case. I think, however, that, in the absence of evidence to the contrary, I ought to draw the inference that the clerk—who, when the

(1) 7 C. B. 987.

Applicant called, was at the office and referred to the absence of the secretary—was so far the clerk in charge that it must be imputed to the company that in office hours he had authority to receive the statement which was made to him in the absence of other persons who, if present, would have had authority to receive such statement.

The case is on the line; but the Applicant did change his mind after applying for the shares, and on the facts, as I read them, he made a communication as to such change of mind to the company before the shares were allotted to him.

As to the other point. The Applicant stopped his cheque, and the fact of his having done so was placed on record in books which were before the directors. It is not shewn that they read the entry as to the stoppage of the cheque; but I am inclined to think that, when directors are allotting shares on the basis of payments having been made by the applicants for shares to the company's bankers, the directors ought to make inquiry, and, if they find that a cheque has been stopped, that should be sufficient to put them on their guard.

The company had no right to make this allotment at the time when they made it. The Applicant at once repudiated the allotment, and in my judgment he is entitled to be relieved of the shares.

Solicitors for Applicant: *Jerome & Co.*
Solicitors for liquidator: *Nash, Field & Co.*

F. E.

C. A.
1894
ROMER, J.
April 3.
C. A.
May 9.

MELLIN *v.* WHITE.

[1893 M. 2306.]

Slander of Goods of a Rival Trader—Injunction.

W., a chemist, was supplied by *M.* with "*M.'s Infants' Food*," made up in bottles and labelled. *W.* sold it by retail, first affixing to each bottle a notice: "The public are recommended to try Dr. *V.'s Prepared Food for Infants and Invalids*, it being far more healthful and nutritious than any other preparation yet offered." *W.* was the owner of Dr. *V.'s* preparation. *M.* brought an action for an injunction to restrain *W.* from affixing these notices. The Plaintiff adduced medical evidence to shew that his food was much better than Dr. *V.'s*, especially for infants under six months.

Romer, J., after hearing the Plaintiff's case and the evidence adduced on his behalf, dismissed the action, without calling on the Defendant or hearing his evidence, being of opinion that the Defendant's notice was a mere puff of Dr. *V.'s* preparation, and gave the Plaintiff no legal ground of complaint:—

Held, on appeal, that there must be a new trial, for that, if on the whole of the evidence it appeared that the statement contained in the Defendant's notice was a false statement about the Plaintiff's goods, to the disparagement of them, and had injured or was likely to injure the Plaintiff, the action would lie.

THE Plaintiff was the manufacturer and proprietor of the food for infants known as "*Mellin's Infants' Food.*" This food was sold wholesale by the Plaintiff in bottles, which were inclosed in paper wrappers, bearing thereon the words "*Mellin's Infants' Food*" and the Plaintiff's trade-mark.

The Defendant was a chemist at *Portsmouth*, and the Plaintiff had for some years been in the habit of supplying him with *Mellin's Food.* In 1893 the Plaintiff discovered that the Defendant had adopted the practice of affixing to the wrappers of the bottles of the Plaintiff's food which he sold, a label in the following terms:—

"Notice.

"The public are recommended to try *Dr. Vance's Prepared Food for Infants and Invalids*, it being far more nutritious and healthful than any other preparation yet offered, sold in barrels,

containing 1 lb. net weight, at 7½*d.* each; or in 7 lb. packets, 3*s.* 9*d.* each. Local agent, *Timothy White*, chemist, *Portsmouth.*"

The Defendant was, in fact, the proprietor of *Dr. Vance's Prepared Food.*

The Plaintiff, by his statement of claim, alleged that Dr. *Vance's* food was far inferior to the Plaintiff's in nutritiveness and healthfulness for infants and invalids, and that the statement on the label to the contrary was untrue, and was made for the purpose and with the object of depreciating the Plaintiff's food, and of inducing persons in the habit of purchasing and using it to believe that it was an inferior article, and to purchase Dr. *Vance's* food instead. The Plaintiff further alleged that the statement on the label that the Defendant was "an agent" was untrue; and the Plaintiff claimed an injunction to restrain the Defendant from offering the Plaintiff's food for sale otherwise than under the original labels and wrappers, or offering it for sale, under the Plaintiff's labels and wrappers, with any unauthorized variations, and from untruly stating or representing to persons purchasing, or about to purchase, the Plaintiff's food, or to the public generally, that the Plaintiff's food was not nutritious or healthful, or that the Plaintiff's food was less nutritious or healthful than Dr. *Vance's.*

The case came on for trial before Mr. Justice *Romer* on the 3rd of April, 1894. The Plaintiff adduced medical evidence to shew that his food was much more wholesome and nutritious, especially for infants under six months, than Dr. *Vance's.* In the turn which the case took the Defendant's evidence was not heard.

Moulton, Q.C., and *A. àB. Terrell*, for the Plaintiff:—

In the first place, the Plaintiff supplies his article wholesale to the Defendant to be retailed by him to the public, and there is an implied contract that the Defendant will retail the article in the wrappers and exactly as it is supplied to him, adding, of course, if he wishes it, his own name and address. Further, the Defendant is the proprietor of "*Dr. Vance's Food for Infants,*" and the statement in his label affixed to our article that he is the

C. A. 1894 MELLIN v. WHITE.

agent for Dr. *Vance's* food is untrue. Also the statement that Dr. *Vance's* food is "more healthful and nutritious than any other," is intended to point the inference that the Plaintiff's is an inferior article, and less healthful and nutritious than the Defendant's. That statement, on our evidence, is absolutely false in fact, and when sent out with the Plaintiff's article is most injurious to him, and amounts to a trade libel, which he is entitled to restrain by injunction.

Neville, Q.C., and *Macnaghten*, for the Defendant, were not called upon.

ROMER, J.:—

I have no doubt that the conduct complained of in this case has been very irritating to the Plaintiff; but I think what the Defendant has done has not given the Plaintiff the right to an injunction. The Plaintiff puts his case in two ways. In the first place, it is said that there was an implied contract on the part of the Defendant when he bought the Plaintiff's food that he should not retail it except in the exact form in which it was sold to him, or, at any rate, only with the addition of his name and address; and also that he should not retail it with any such label as that which is complained of in this action. All I need say is, that that part of the case wholly broke down. No such implied contract was proved, or could be said to exist.

The second point is this: It is said that what the Defendant has done has amounted to publication of a trade libel upon the Plaintiff. Well, as I have said, I have no doubt that what the Defendant has done has been very aggravating to the Plaintiff. But, as a matter of fact, I think any ordinary human being, reading this label that the Defendant has put on, would come to the conclusion that it was a mere puff of "*Vance's Food*," and nothing more; and it is noticeable that the Plaintiff has not attempted to bring any evidence to shew that any person for a moment would read or understand it in any other light. It comes simply to this: one tradesman says that his food is the best, and another tradesman thinks himself injured by that.

The Plaintiff considers, and probably he may be right in that, that his food is the best. So far I have only heard his evidence, and, no doubt, so far as it goes, it does tend to shew that his food is the best—at any rate, for infants under six months old. But, as I have said, no person on seeing what the Defendant has done would read this statement put upon the Plaintiff's food as being anything more than a rival puff. Of course, it is always very annoying to a man who has a good article to find a person who is puffing a rival article, stating that the rival article is really the best, and it is still more annoying to find that statement put upon the goods of the man who complains. But, however annoying the form of the Defendant's advertisement may be to the Plaintiff, I come to the conclusion that what has been done by the Defendant has not amounted in any true sense to a trade libel as against the Plaintiff, and that the Plaintiff has no legal remedy in respect of it. Therefore, I dismiss the action.

H. L. F.

C. A.

The Plaintiff appealed. The appeal was heard on the 9th of May, 1894.

Moulton, Q.C., and *A. à B. Terrell*, for the appeal:—

The putting this label on *Mellin's* bottles is a step calculated to injure the sale of *Mellin's Food*. It is a trade libel, being an untrue statement made to purchasers of *Mellin's Food* that it is inferior to Dr. *Vance's*.

[LINDLEY, L.J., referred to *Young* v. *Macrae* (1), and LOPES, L.J., to *Ratcliffe* v. *Evans* (2).]

Neville, Q.C., and *Macnaghten*, for the Defendant:—

There is no difference of substance between this case and the ordinary case of a tradesman publishing a puff saying that his goods are the best of their kind in the market. Suppose a bootmaker were to advertise that his were the best boots in the market, could a bootmaker next door bring an action, on the ground that the advertiser was stigmatizing the neighbour's goods as inferior to his? This is that case.

(1) 3 B. & S. 264. (2) [1892] 2 Q. B. 524

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LINDLEY, L.J. :—

I think in this case the learned Judge has gone too far in giving judgment for the Defendant upon the materials which were laid before him. He appears to have proceeded on the ground that, even if the Plaintiff's evidence stood uncontradicted, this action could not in point of law be sustained. I think that is going too far. The Defendant has brought upon himself a new form of attack by adopting a new mode of carrying on business. Nobody in this Court, at all events, has ever seen or heard of a tradesman selling goods in the bottles and with the labels used by the manufacturer, and putting on them labels which disparage the article contained in the bottles. It is quite a new idea. I do not say it is illegal. I do not say it is overstepping the mark. But if, upon hearing the whole of the evidence to be adduced, the result should be that the statement contained in the label complained of is a false statement about the Plaintiff's goods to the disparagement of them, and if that statement has caused injury to, or is calculated to injure the Plaintiff, this action will lie.

The facts have not been ascertained. The law applicable to the case is to be found in the *Western Counties Manure Company* v. *Lawes Chemical Manure Company* (1), and in *Thomas* v. *Williams* (2), to which may be added *Ratcliffe* v. *Evans* (3), and it is having regard to those decisions that I have enunciated the proposition that if the facts I have mentioned are found in the Plaintiff's favour an action for an injunction will lie.

Under these circumstances as we cannot without the consent of both parties take a short cut, we must discharge the order, direct a new trial, and order the costs of the previous trial and of this appeal to abide the event of the new trial. If the learned Judge thinks it right he can try the action himself. If he thinks it right he can direct an issue to be tried before a jury. We leave that entirely to him. The case must go back for a new trial, in order that the facts may be fully ascertained.

(1) Law Rep. 9 Ex. 218. (2) 14 Ch. D. 864.
(3) [1892] 2 Q. B. 524.

LOPES, L.J.:—

All I desire to say is, that in my opinion it is actionable to publish maliciously, without lawful occasion, a false statement disparaging the goods of another person, and causing such other person damage, or likely to cause such other person damage. I think, provided that can be made out, an action for an injunction will lie. All these matters as far as we know at the present moment are undecided, they have not been proved, the evidence has only been heard upon one side, and whether or not the statement in the Defendant's notice is false we are not in a position to say. Evidence was given on the part of the Plaintiff, but no evidence was given on the part of the Defendant. For anything I know, the Defendant may be able to shew that the evidence which was given for the Plaintiff was incorrect, and that no false statement has been made at all.

Then there is the question of disparaging the goods of the Plaintiff. That is a question which will have to be considered, and then there is the further question, provided a false statement has been made, and a statement disparaging the goods of the Plaintiff, what the effect of that will be upon the Plaintiff's goods. As I have already said, I think in order to maintain an action at common law actual damage must be made out; but it is not necessary to shew that in an action for an injunction. It is sufficient to shew that what has been done is likely to produce damage. It has been suggested that there is nothing in this case calculated to make out that damage is likely to result. That matter will have to be considered; but it does appear to me that putting this statement upon *Mellin's* goods at any rate raises a question well worthy of consideration, as to whether or not damage may not be inferred. I think, therefore, there should be a new trial.

KAY, L.J.:—

I will only add I concur, because I do not desire to say anything that may in the least degree prejudice the course of a new trial. Whether or not this notice does disparage *Mellin's* goods, whether or not the statement is false, and whether or not it is calculated to produce damage, are all questions which as far as I

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can see are entirely open, and I think it would have been better if the case had been completely tried out by the learned Judge. I agree that the costs of the action and of this appeal should abide the event of the new trial.

Solicitors: *Eldred & Bignold*; *A. W. Mills*, agent for *Cousins & Burbidge, Portsmouth.*

H. C. J.

C. A. 1894 *May* 9.

PEEK *v.* RAY.

[1893 P. 997.]

Interrogatories—Allowance of by Judge—Objection to Answer—Rules of Supreme Court, 1883, *Order* XXXI., *rr.* 1, 6.

In a suit relating to the affairs of a partnership *A.* and *R.* were Defendants as executors of a deceased partner *W.*, and *R.* was also Defendant in respect of an interest in the partnership. An order was made in a suit for the administration of *W.'s* estate, giving *A.* the conduct of the defence on behalf of *W.'s* estate. The Plaintiff exhibited interrogatories for the examination of *A.* and *R.*, which were laid before the Judge, who made some alterations and allowed the interrogatories as altered. *A.* appealed from the allowance of interrogatories to be administered to *R.*, and also, as regarded himself, appealed against the allowance of the interrogatories as premature:—

Held, that *A.'s* being appointed to defend the suit on behalf of *W.'s* estate did not affect the Plaintiff's right to interrogate *R.*

The allowance by a Judge of interrogatories to be administered to a party does not amount to a decision that the party is bound to answer them, but leaves him at liberty to take any objection to answering which he might otherwise have taken.

An appeal from the allowance of interrogatories by a Judge will not be allowed unless the Judge has gone on a wrong principle or done substantial injustice.

The appeal was therefore dismissed.

THE Plaintiff *Peek* and *W. R. Winch* entered into partnership for their joint lives. By an indenture indorsed on the articles of partnership it was provided that in case of the death of either partner the amount of his capital, as shewn by the last preceding balance-sheet, should be paid by the surviving partner to his executors or administrators by yearly instalments of £20,000 each, with interest as therein mentioned, and that the surviving

partner should also pay to the executors or administrators of the deceased partner, as and by way of purchase-money for the deceased partner's share in the property and effects of the partnership and the use of his name and capital in the business, the sum of £17,500, by four annual payments of £5000, £5000, £5000, and £2500, subject to a proviso that if, from any cause, the £17,500 should exceed five-fourteenths of the aggregate net profits realized by the surviving partner during three and a half years from the death of the deceased partner, the excess should be retained by the surviving partner out of the balance of capital remaining due to the deceased partner.

Winch died on the 4th of April, 1888. His executors were *Ray* and *Archibald*, the Defendants in this action. *Ray* was interested as a partner in the business.

Disputes having arisen as to the amount payable to the executors, an agreement of compromise dated the 12th of April, 1889, between the Plaintiff and the Defendants was entered into. As to the contents of this agreement it is sufficient to say that in the present suit the Defendants contended that on its true interpretation the £17,500 was to be paid without any regard to the proviso mentioned above, and the Plaintiff contended that the agreement did not affect the proviso. The agreement was sanctioned by the Court on an originating summons in the matter of *Winch's* estate.

In April, 1893, the Plaintiff commenced the present action, and by his statement of claim alleged that £17,500 exceeded five-fourteenths of the aggregate net profits realized by the Plaintiff during the three and a half years by £15,759 16*s.* 4*d.*, or thereabouts, and claimed a declaration that the agreement of the 12th of April, 1889, did not affect the rights of the Plaintiff under the proviso, and that he was entitled to retain the excess of the £17,500 over the five-fourteenths of the three and a half years' profits, or, in the alternative, rectification of the agreement —an account of the net profits during the three and a half years —or, in the alternative, rescission of the agreement and an account of what ought independently of that agreement to be paid by the Plaintiff to the Defendants.

On the 24th of June, 1893, an order was made on an originating

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summons declaring that the estate of *Winch* ought to be administered by the Court, and liberty was given to the executors to defend the action of *Peek* v. *Ray*, and put in a counter-claim, and it was ordered that *Archibald* should have the conduct of the defence.

A defence was put in which insisted that the agreement of the 12th of April, 1889, precluded any reduction of the £17,500 on account of its exceeding the five-fourteenths of three and a half years' profits, and alleged that if the question of profits was to be entered into, the accounts on which the Plaintiff relied as proving the excess were incorrectly and unfairly taken.

On the 16th of April, 1894, the Plaintiff applied to Mr. Justice *North* for leave to deliver interrogatories in writing to the Defendants. The proposed interrogatories were submitted to the Judge, who, after striking out some parts of them, gave the Plaintiff leave to deliver them, and ordered "that the said Defendants do answer the interrogatories as prescribed by Order XXXI., rules 8 and 26, of the Rules of the Supreme Court 1883, within one month from the date of this order."

The first eight of the interrogatories, which were twelve in number, were directed to bringing out that it was not within the contemplation of the parties when the agreement of the 12th of April, 1889, was entered into, that the proviso should be affected by it. The ninth and following interrogatories related to the impeachment by the Defendants of the accounts by which the Plaintiff made out the excess of £17,500 above the five-fourteenths of profit.

The Defendant *Archibald* appealed, asking that the interrogatories might be disallowed, or, in the alternative, that the order might be varied by ordering that the Defendant *Archibald* should answer the interrogatories (or such of them as the Court might order to be answered) on behalf of both Defendants.

Cozens-Hardy, Q.C., and *Montague Lush*, for the appeal:—

The ninth interrogatory is premature, and the answering it will cause great expense. The interrogatories having been settled by the Judge under Order XXXI., rule 1, as altered in November, 1893, it is *res judicata* that none of the interrogatories

are premature, and that they must be answered, and therefore, except by appealing from the allowance, we cannot protect ourselves from answering premature interrogatories. The sole conduct of the defence having been given to the Defendant *Archibald*, he only ought to answer interrogatories, and not *Ray*.

Swinfen Eady, Q.C., and *Christopher James*, for the Plaintiff, were not called upon.

LINDLEY, L.J.:—

This is an action by Mr. *Peek*, who is a surviving partner, against Mr. *Ray*, who is also a surviving partner, and Mr. *Archibald* and Mr. *Ray*, as the executors of a deceased partner named *Winch*, and there is a controversy between them about the mode of winding-up the partnership, and, in particular, whether a particular deed of compromise come to in 1889 is binding, and what the true construction of it is.

Mr. *Archibald* has by order been appointed to defend this action on behalf of himself and Mr. *Ray*, that is, on behalf of the estate. The Plaintiff has administered interrogatories for the examination of Mr. *Ray* and Mr. *Archibald*, and the learned Judge, under the orders of November, 1893, has looked into the matter and given leave to deliver those interrogatories to both of them. Mr. *Archibald* appeals against the delivery of interrogatories to Mr. *Ray*. It strikes me as a most extraordinary appeal. I never yet heard of one defendant appealing against an order that another defendant should answer interrogatories. It is sought to support the appeal by saying that Mr. *Archibald* has liberty to defend, but that is no reason at all why the Plaintiff should not interrogate Mr. *Ray*. I think Mr. *Archibald's* appeal from the order requiring Mr. *Ray* to answer interrogatories or to make an affidavit is utterly wrong. As to his appeal from so much of the order as relates to himself there is more to be said. The learned Judge, under the new rules, has gone into the matter, and has come to the conclusion that these interrogatories for the examination of Mr. *Archibald* ought to be allowed. Now, what ought we to do? Ought we to scan these interrogatories and resettle them, or consider anything except whether there has

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been any error in principle on the part of the learned Judge who has authorized them? I protest altogether against settling interrogatories. I admit the right to appeal, and it is our duty to entertain the appeal and say whether there is any substantial injustice done by the order appealed from. If there is, we ought to interfere, but, if there is not, I protest against our being asked to go into trumpery matters to consider whether an interrogatory is a little too wide or too narrow. In substance it appears to me there is nothing wrong. The appeal is brought upon an erroneous theory that the Judge by allowing these interrogatories has predetermined that there is no objection to answering them. But there may be objections which it is perfectly open to the Defendant to take by his answer, and when he has taken those objections by his answer it will be the duty of the Judge to say whether they are valid objections or not. An answer might tend to criminate, and that would be a reason for raising an objection. Although the learned Judge has allowed the interrogatories, he has only allowed them subject to all proper objections. The only point upon which the Judge must have made up his mind, is that a particular interrogatory is not premature. Still, his decision is not *res judicata*, and if the Defendant can shew upon oath that an interrogatory allowed is premature, it is open to a Judge to require no further answer. But the decision of a Judge that interrogatories should be allowed and are not premature is an exercise of discretion from which no appeal ought to be brought or listened to unless gross injustice has been done, or some serious error in principle can be shewn to have been made.

LOPES, L.J.:—

I am of the same opinion.

The interrogatories have been delivered under the new rules, the Rules of November, 1893, and one objection taken by Mr. *Archibald* is that there is no right to administer interrogatories to Mr. *Ray*—another Defendant. I never heard in my life of a case where one Defendant objected to interrogatories being delivered to another Defendant, and such an objection, I think, cannot be taken.

The learned Judge, as I have already said, has allowed these interrogatories under the new rules. He has carefully gone through them, and he has made certain alterations. He has struck out certain things that he thought ought not to be included, and has allowed them as so altered. There is an appeal to this Court from that allowance by the Judge, and it is said that some of these interrogatories are premature. I am unable to say that there is not a right of appeal, but I do most firmly say this, that I think an appeal of this kind is most improper. I think no appeal ought to be brought, and no appeal I am certain will be allowed by this Court in a case like this, unless there is some error on a question of principle involved, or some substantial injustice has been done. It seems to me that the appeal proceeds on a mistaken view. It is contended that the learned Judge by allowing interrogatories precludes the party interrogated from taking any objection to answering them. In my opinion that is incorrect. What the learned Judge does when he allows the interrogatories is this: he determines whether it is a case in which interrogatories ought to be delivered at all, and then under the new rules he deals with each interrogatory (he is bound to do that) for the purpose of seeing whether *primâ facie* and on the face of it that particular interrogatory is proper. That is what he does when he allows the interrogatory, but he does not preclude any objections being taken by the party interrogated when he files his affidavit in answer to the interrogatories. To my mind that is made perfectly clear by Order XXXI., rule 6. The new orders came into operation in November, 1893; but Order XXXI., rule 6, remains, and what does that say? It says, "Any objection to answering any one or more of several interrogatories on the ground that it or they is or are scandalous or irrelevant, or not *bonâ fide* for the purpose of the cause or matter, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer." That rule remains, and to my mind makes it clear beyond all doubt that an allowance of interrogatories by a Judge does not preclude an objection being taken in the way provided for under Order XXXI., rule 6.

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KAY, L.J.:—

I entirely agree with the judgments that have been pronounced. I should have doubted, I confess, looking at the terms of Order XXXI., rule 1, of the new rules, whether any order was required. It is only, "In any cause or matter the plaintiff or defendant by leave of the Court or a Judge may deliver interrogatories." I doubt whether leave should be treated as an order. But supposing it is to be so treated, I say, speaking for myself, most emphatically, that where a Judge has, under these new rules, had interrogatories brought before him, and has determined whether he will allow them or not, or which of them he will allow, or what part of them he will allow, if any one chooses to appeal from that allowance, I hope he never will be allowed to succeed unless he can shew some serious question of principle in which the Judge in the leave he has given has made a material error. To say that this Court is to be asked to look through the interrogatories which the learned Judge of first instance has allowed, and to see whether this, that, or the other part of an interrogatory has been properly allowed or not, is to my mind a total mistake as to the functions of the Court of Appeal. That allowance of interrogatories is a matter very largely in the discretion of the learned Judge before whom the interrogatories are brought, and from such discretion the rule is that although an appeal may be brought, no appeal shall be allowed to succeed unless it shall be shewn that in the exercise of that discretion a material mistake has been made.

When we come to examine the various points that have been made here, I do not think this is a case in which an appeal ought ever to have been attempted. First of all there is this. Two executors of a deceased partner are made co-defendants to an action which relates to partnership affairs, and which has for one of its objects the rescission of an agreement which was intended to facilitate the winding up the affairs of the former partnership in which the deceased man was a partner. One of those Defendants has been allowed to conduct the defence, for this simple reason, that the other executor is a surviving partner, and he may possibly have interests which will be in conflict with those of the estate of the deceased partner. The executor who is

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allowed to defend then says: "The Plaintiff shall not administer interrogatories to my co-executor." Why not? "Because I think the answer may be an answer that may be prejudicial to me." What has the Plaintiff to do with that? The Plaintiff wants to get at the truth of the case, and he wants to get admissions from the other Defendant in the action. I doubt extremely whether any admission made by a co-executor who is a surviving partner could be used against the other executor; but whether it could or not, does that limit the power of the Plaintiff to administer interrogatories, and particularly where the Judge has given him leave to administer them? To my mind, clearly not.

The rest of the objections depend upon a close examination of these interrogatories. The only one I think it necessary to deal with is this. Certain interrogatories had been proposed with regard to the accounts of the partnership, not interrogatories requiring accounts to be delivered, but interrogatories to make out what are the objections on principle to a certain account that had been made out. The learned Judge has said, subject to certain modifications which he has made in the interrogatories, modifications which shew that he did not intend to allow the Plaintiff to require the accounts to be furnished, "I will allow these interrogatories." "That is premature," it is said; "and if I were to take an objection to answering, it would be *res judicata* that I must answer." That is not so. On the interrogatories being allowed by the learned Judge, he allows them subject to the orders of the Court, and one of the orders of the Court which is not abolished by the new rules is Order XXXI., rule 6, to which my Brother *Lopes* has referred, which enables everybody who has to answer interrogatories to raise any objection which he may think proper to raise, and to decline to answer, and then for the first time the learned Judge will have to consider whether the objection is good or not; and the allowance of an interrogatory by a Judge, although he goes through the interrogatory and strikes out part and allows other parts to remain, means no more than this, "I allow these interrogatories subject to any objection which the person to whom they are addressed may have a right to make, that objection to answer being pointed out by

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Order XXXI., rule 6, and notwithstanding my allowance, he may make the objection just as though I had not allowed it." The Judge has given leave merely to administer interrogatories, and that does not mean in my opinion that he has prejudged the question whether the interrogatories ought to be answered or not. I confess that I think this kind of appeal should be discouraged in every way possible, and this appeal is utterly wrong, and must be dismissed with costs.

Solicitors: *Paines, Blyth, & Huxtable; Druces & Attlee.*

H. C. J.

C. A. 1894 *July* 9.

In re McHENRY. McDERMOTT *v.* BOYD.

BARKER'S CLAIM.

[1891 M. 1550.]

Debt—Security—Mortgage—Contract to Pay Difference on Realization—Cause of Action—Postponement—Time of Accruer of Cause of Action—Statute of Limitations (21 *Jac.* 1, *c.* 16), *s.* 3.

By a memorandum of deposit, dated in 1882, of bonds to secure the repayment in 1883 of an advance, the borrower authorized the lender to sell the bonds for the purpose of repaying the advance, and undertook to pay the lender any difference between the proceeds of the bonds and the amount of the advance. In 1889 the lender sold the bonds, but the proceeds were not sufficient to repay the whole of the advance. In 1891 the borrower died without having given any acknowledgment of the debt:—

Held (reversing the decision of *North*, J.), that the cause of action in respect of the whole of the debt accrued in 1883 and not in 1889, and therefore that a claim for the difference by the lender against the estate of the borrower was barred by the *Statute of Limitations*.

THIS was a summons to vary the certificate of the Chief Clerk in an action for the administration of the estate of *James McHenry*, a deceased testator. The summons was taken out by *Henry James Barker*, a money broker, who claimed to be a creditor of the testator for the unpaid balance of an advance of £13,365, made by *Barker* to the testator in August, 1882, being the purchase-money for £13,500 Western Extension Bonds of the

Atlantic and Great Western Railway Company. A scrip certificate of the bonds was handed to *Barker* as security for the loan, and a letter dated the 20th of August, 1882, addressed to *Barker*, was signed by the testator in the following terms: "In consideration of your advancing to me the sum of £13,365 at 6½ per cent. per annum, repayable with interest on the 30th of November, 1882, I hand you herewith the undermentioned securities of the nominal value of £13,500 to be held by you as collateral security for the due repayment of the said loan and the interest thereon.

"In the event of the loan remaining unpaid after it becomes due, I hereby authorize you to realize the securities as you may deem fit, for the purpose of repaying yourself the amount due to you, and I undertake to pay you any difference between the net proceeds of the securities and the amount due to you as well on account of the sum advanced as for interest thereon and all charges and expenses of realization."

Below the testator's signature was written:—

"List of securities.—£13,500 8 per cent. scrip (committee's certificates) Western Extension Bonds of the *Atlantic and Great Western Railway.* On payment of the interest due the 30th of November, 1882, I engage to renew the above loan for three months further."

The last paragraph was initialed by *Barker*, and in accordance with it the loan was renewed for a further three months, namely, till February, 1883. The scrip certificate was exchanged for bonds, which remained in the possession of *Barker* till September, 1889, when he sold them, but the proceeds were not sufficient to repay the whole of the loan; in the meantime he received the dividends on the bonds. In February, 1884, *McHenry* paid £100 on account, but after that date he neither made any further payment, nor gave any acknowledgment of the debt.

The testator died in May, 1891. The Plaintiff was a creditor of the testator, and the Defendants were the executors of his will. The Chief Clerk disallowed the whole of *Barker's* claim, on the ground that it was barred by the *Statute of Limitations.* *Barker* now sought to vary the certificate by having his claim admitted to proof. The claim was resisted by the executors.

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The summons came on for hearing before Mr. Justice *North* on the 2nd of May, 1894: when he decided that the statute only began to run from the date of realization in September, 1889: and allowed the proof.

The executors appealed. The appeal was heard on the 9th of July, 1894.

Cozens-Hardy, Q.C., and *Gregson*, for the executors:—

The statute began to run from the earliest time at which *Barker* could have brought his action—that is, in 1882 or 1883: *Reeves* v. *Butcher* (1); approving of *Hemp* v. *Garland* (2). The claim is therefore barred.

S. Hall, Q.C., and *Herbert Brown*, for *Barker*:—

The question is, what was the earliest time—according to the rule in *Reeves* v. *Butcher*, which we do not dispute—at which *Barker* could have brought his action? We say, not until 1889, when the securities were sold and the actual amount payable was ascertained. The contract created by the letter is severable; it is the second part that gives rise to the claim, namely, for the difference between the proceeds of sale and the original advance; and that difference, and consequently the cause of action, was not ascertainable until 1889. There can be no objection to a creditor contracting so as to postpone his cause of action indefinitely. The meaning of the contract on the part of the debtor is not that he will pay immediately, but that he will pay when he is able to do so by means of the realization; and time does not begin to run until he is able to pay: *Hammond* v. *Smith* (3). The principle under which a surety has no actionable debt against his co-sureties for contribution until it is actually ascertained that he has paid more than his due proportion of liability, is applicable to this case: *Ex parte Snowdon* (4).

LORD HERSCHELL, L.C.:—

The sole question arising on this appeal is, whether a certain claim against the executors of *J. McHenry* is barred by the

(1) [1891] 2 Q. B. 509.
(2) 4 Q. B. 519.
(3) 33 Beav. 452.
(4) 17 Ch. D. 44.

Statute of Limitations. On the 20th of August, 1882, the sum of £13,365 was advanced by *Barker* to *McHenry*, and a document was thereupon signed by *McHenry* in these terms:—[His Lordship read the letter of that date, and continued:—] To this document a memorandum was added, which was in these terms: —[His Lordship read it, and continued:—] The loan was therefore to continue till February, 1883, and it is said that in February, 1884, a sum of £100 was paid on account. It is obvious that, as regards the debt which was due in February, 1884, notwithstanding any payment on account, it was completely barred at the time of the death of *McHenry* in May, 1891.

But it is said that the claim is not barred by reason of the second paragraph of the document I have read; that, as the securities were not realized until September, 1889, until realization the actual amount due could not be ascertained, and that therefore the statute could only begin to run from the date of realization. This view found favour with the learned Judge in the Court below; but, with all deference, I am unable to agree with him. The second paragraph of the document was no doubt intended to give, and did give, *Barker* a power of sale over the bonds; and, a power of sale being so given, the creditor, if he exercised his power of sale, would be bound to set against the debt due to him *pro tanto* the amount realized by the securities; but, in determining the amount realized, the expenses of realization must be taken into account, and only the net amount of the realization, after payment of those expenses, could be set against the debt. Now that claim could have been made by him quite independently of any express authority contained in the latter part of the agreement. If, as was properly admitted by the counsel for Mr. *Barker*, the latter part had been confined to the power of sale, the right of the creditor in law would have been precisely the same as if those words had not been inserted. I cannot say that that right of realization gave a new, separate, and independent cause of action, so that the statute did not begin to run until from that date. The truth is that the debt is one debt only. The second clause of the document did not create a new debt, but only prescribed what should be done in the event of realization, and what use should be made of the money realized.

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The words gave the creditor no right which would not equally have existed without them. The contention of the Respondent comes to this, that although the words of the document gave no new right, and only put into words what the creditor's legal rights would have been without any such words, yet because these words are used, they give an independent right, and the operation of the statute could be indefinitely postponed by a mere statement of the legal rights which the creditor would have had without any such statement, whereas, if they had not been used, the statute would have begun to run from the earlier date. That, in my opinion, is an impossible contention, and therefore the judgment of the Court below must be reversed.

LINDLEY, L.J.:—

I am of the same opinion. As I differ from the learned Judge below, I will shortly state the views I adopt. In the first place, the action turns upon the statute 21 Jac. 1, c. 16, which provides that actions for debt shall be brought within six years from the cause of action, and not after. The document now in question has been read by the Lord Chancellor, and therefore I will not read it again. It says that the sum of £13,365 is to be repaid, with interest, on the 30th of November, 1882, a period which was afterwards enlarged to February, 1883. That part of the document does not in words contain a promise to pay at that time. I put it to counsel for the Respondent whether they contended that an action could not then have been brought; but it is obvious that, on that contract alone, an action could then have been brought.

Now comes the clause—the second paragraph—upon which Mr. Justice *North* thought there was a new contract. It appears to me that that clause was not intended to alter the contract to pay, but to express the right of the creditor as to the mode of dealing with the securities. It gives him power to sell the securities, and directs him what to do with the proceeds, and says that the debtor will pay any deficiency. That does not affect the original promise or obligation to pay. The clause is this:—[His Lordship read it, and continued:—] It means that, if the amount is not paid when it becomes payable, *Barker* may

realize the securities, giving *McHenry* credit for the amount of the proceeds. The promise to pay the deficiency does not create a new obligation to pay: it only applies the old obligation to a reduced sum. The realization of the security does not add to the cause of action; the cause of action accrued long before.

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The appeal must be allowed, with costs.

DAVEY, L.J.:—

I am of the same opinion. I have nothing to add.

Solicitors: *Hores & Pattisson; G. S. & H. Brandon.*

G. I. F. C.

In re LORD GERARD AND BEECHAM'S CONTRACT.

C. A. 1894 CHITTY, J. *April* 24, 25. C. A. *July* 11.

[1893 G. 2149.]

"Rent-charge"—Conveyance of Land and Easement to Corporation reserving Perpetual Rent—Charge on Rates and Tolls—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *ss.* 10, 11.

A perpetual rent reserved as the consideration upon the sale of land, even though no power of distress is contained in the conveyance to the purchaser, is, upon a subsequent sale of the rent, not improperly described by the then vendor as a "rent-charge," inasmuch as a power of distress is conferred by the Act 4 Geo. 2, c. 28, s. 5.

In a contract for sale the subject-matter was described as "an aggregate yearly rent-charge of £215 9*s*., payable in perpetuity by the Corporation of *Liverpool* in respect of a waterpipe rent, created under the authority of the *Liverpool Corporation Waterworks Act*, 1855, and secured by covenants of the corporation, and by a statutory charge on the rates leviable by the corporation under their Acts."

The abstract of title shewed that in 1856 the vendor's predecessors in title (one of whom was an absolute owner, and the other a tenant for life under a settlement) had respectively granted lands and easements to the corporation in consideration of two rents of £1 5*s*. and £250, respectively payable in perpetuity by the corporation, and that the corporation had covenanted to pay those rents respectively. The rent comprised in the contract of sale consisted of the rent of £1 5*s*. and £214 4*s*., part of the rent of £250. The vendor was tenant for life under a settlement, and had sold under his statutory powers. The Act of 1855 (with which the *Lands Clauses Consolidation Act*, 1845, was incorporated) empowered the corporation "to purchase, either absolutely for a sum in gross, or at an annual or other rent," certain lands "or any easement over the same";

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and the Act provided that "the persons empowered by the *Lands Clauses Consolidation Act*, 1845, to convey lands shall have full power to convey or grant in perpetuity, at an annual or other rent, any lands, for the purposes of this Act or the Acts incorporated therewith, or any easement over such lands":—

Held, that the rent sold was not improperly described as a "rent-charge," and that by virtue of sect. 11 of the *Lands Clauses Consolidation Act*, 1845, it was charged on the water rates leviable by the corporation.

SUMMONS under the *Vendor and Purchaser Act*, 1874, by a vendor, asking for a declaration that a good title had been shewn by him to the property comprised in a contract for sale, dated the 20th of July, 1893, and therein described as "an aggregate yearly rent-charge or sum of £215 9*s*., payable in perpetuity by the Corporation of the City of *Liverpool* in respect of a water-pipe rent, created by virtue and under the authority of the *Liverpool Corporation Waterworks Act*, 1855, and subsequent Acts, and secured by covenants of the Corporation of the Borough of *Liverpool*, and by a statutory charge on the rates leviable by the corporation under the provisions of some of those Acts."

The contract was entered into between Lord *Gerard*, as vendor, and *Thomas Beecham*, as purchaser. The property had been put up for sale by auction under the above description, and *Beecham* was at the sale declared the purchaser at the price of £7000, and he signed the contract in question.

The conditions of sale stated that "the property offered for sale is composed of the whole of a perpetual yearly rent of £1 5*s*., created by a deed dated the 31st of March, 1856, and of part (£214 4*s*.) of a perpetual yearly rent of £250 created by a deed dated the 5th of April, 1856, and the titles shall commence with those deeds respectively. . . . The vendor sells the property under his statutory power as tenant for life of the *Garswood* estate in *Lancashire*, including the said yearly rents." An abstract of title was delivered by the vendor in accordance with the conditions.

The deed of the 31st of March, 1856, was made between *James Clough* of the one part (who was the absolute owner of the land to which the deed related), and the Corporation of *Liverpool* of the other part, and, after a recital that the corporation had required *Clough* to execute to them a grant in perpetuity of the

easements and authorities thereinafter granted at the rent and subject to the covenants thereinafter reserved, and on their part to be paid, observed, and performed, *Clough*, in pursuance of the said contract for sale, granted easements over land in the township of *Ashton* unto the corporation, their successors and assigns, yielding and paying therefor yearly and every year unto the said *Clough*, his heirs and assigns, the yearly rent of £1 5*s*., and the corporation covenanted to pay that rent to *Clough*, his heirs and assigns.

The perpetual rent of £1 5*s*. became in 1864 vested by purchase in Sir *R. T. Gerard*, his heirs and assigns, and in 1875 it became subject to the settlement of the *Garswood* estate.

The deed of the 5th of April, 1856, was made between Sir *R. T. Gerard* (the father of Lord *Gerard*, the vendor) of the one part, and the Corporation of *Liverpool* of the other part. The deed contained a recital of the *Liverpool Corporation Waterworks Act*, 1847 (10 & 11 Vict. c. cclxi.), with which were incorporated the *Lands Clauses Consolidation Act*, 1845, and the *Waterworks Clauses Act*, 1847, so far as the same were respectively applicable, and were not modified by or inconsistent with the provisions of the *Liverpool Corporation Waterworks Act*, 1847; a recital of some of the provisions of the *Liverpool Corporation Waterworks Act*, 1855 (18 Vict. c. lxvi.); a recital that under the will of Sir *Wm. Gerard*, deceased, Sir *R. T. Gerard* was tenant for life in possession of (*inter alia*) the lands and hereditaments thereinafter mentioned and described, with remainder to the use of his eldest son *W. C. Gerard* (the present vendor), and the heirs male of his body, with divers remainders over; and a recital that the corporation, by virtue and under the authority of the powers and provisions of the *Liverpool Corporation Waterworks Act*, 1855, and of the several Acts therein recited and therewith incorporated, and for the purposes of the *Liverpool Corporation Waterworks Act*, 1847, had contracted and agreed with Sir *R. T. Gerard* for an absolute grant and conveyance in fee simple of the lands thereinafter particularly described, and also for a grant in perpetuity of the easements, privileges, powers, and authorities thereinafter mentioned and described, at and for the perpetual yearly rent or sum of £250. And it was witnessed that, in consideration of the yearly rent or

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payment thereinafter reserved and covenanted to be paid, and of the covenants and agreements by and on the part of the *Liverpool* corporation thereinafter contained, Sir *R. T. Gerard*, under and by virtue and in pursuance and execution of the powers, authorities, and provisions created by, and expressly and by reference contained in, the *Liverpool Corporation Waterworks Act*, 1855, granted unto the corporation, their successors and assigns, certain parcels of land, and certain easements over those and other lands respectively situate in the township of *Ashton*, to hold the same unto the corporation, their successors and assigns, yielding and paying therefor yearly and every year for ever unto the said Sir *R. T. Gerard* during his life, and after his decease to the person or persons who, under the limitations contained in the will of the said Sir *Wm. Gerard*, was or might become entitled to the lands and hereditaments which, after the execution of the deed in recital, would remain subject to the uses of that will in remainder after the life estate of Sir *R. T. Gerard*, and to the heirs male of the body, or heirs or assigns, as the case might be of such person or persons, according to his or their estate and interest or estates or interest in such lands and hereditaments under such will, the yearly rent or sum of £250, by equal half-yearly payments as therein mentioned. And the same deed contained a covenant by the corporation with Sir *R. T. Gerard*, and with every person who, under the reservation of the yearly rent thereinbefore reserved, was or might become entitled to that yearly rent, that the corporation, their successors or assigns, would pay the said yearly rent on the days and in manner previously mentioned for the payment thereof.

By a re-settlement, dated the 24th of March, 1875, the vendor became tenant for life of the *Garswood* estates.

The corporation of *Liverpool* were empowered by their Act of 1847 and the *Waterworks Clauses Act*, 1847, and other Acts, to levy water rates.

The preamble of the *Liverpool Corporation Waterworks Act*, 1855 (18 Vict. c. lxvi.), recited the *Liverpool Corporation Waterworks* Act, 1847, the *Liverpool Corporation Waterworks* (*Amendment*) *Act*, 1850, and the *Liverpool Corporation Waterworks* (*Deviations*) *Act*, 1852, and that it was expedient that the mayor,

aldermen, and burgesses of the borough of *Liverpool* should be empowered to execute certain specified works.

By sect. 2: "Subject to the provisions of this Act, and with and subject to such of the powers and provisions of the recited Acts and of the Acts incorporated therewith as are not hereby altered or repealed, it shall be lawful for the mayor, aldermen, and burgesses to make and maintain the said works . . . . and for that purpose to purchase either absolutely for a sum in gross, or at an annual or other rent, and to enter upon, take, and use such of the lands delineated on the said plans and referred to in the said book of reference as shall be necessary for that purpose, or any easement, privilege, power, or authority in or over the same, and the new works respectively by this Act authorized shall for all intents and purposes become and be part of the undertaking of the *Liverpool Corporation Waterworks*."

By sect. 3: "The persons empowered by the *Lands Clauses Consolidation Act*, 1845, to convey lands shall have full power to convey or grant in perpetuity, at an annual or other rent, any lands for the purposes of this Act, or the Acts incorporated herewith, or any easement, power, or authority in or over such lands."

The purchaser objected that there was nothing to shew that the so-called "rent-charges" were charged on the water rates. The vendor replied that by the Act of 1855, and the other Acts mentioned in the deed of the 5th of April, 1856, sect. 11 of the *Lands Clauses Consolidation Act*, 1845, was made applicable to conveyances by limited owners for the purposes of the *Liverpool Corporation Waterworks*, and had operation under the conveyance made by that deed. The purchaser replied that the deeds of the 31st of March and the 5th of April, 1856, reserved "rents" only, and did not purport to create "rent-charges," and that sect. 11 of the *Lands Clauses Consolidation Act* had not the operation alleged by the vendor, and that there were not in 1856 any rates or tolls within the meaning of that section upon which the rents in question could be charged.

The summons came on for hearing before Mr. Justice *Chitty* on the 24th of April, 1894.

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Levett, Q.C., and *T. C. Wright*, for the vendor:—

The joint effect of the *Lands Clauses Consolidation Act*, 1845, ss. 10, 11, with the special Act of 1855, is to create a valid charge on the water-rates of the corporation of *Liverpool*, and what we sold was accurately described as a "rent-charge."

Byrne, Q.C., and *Theobald*, for the purchaser:—

The vendor has not shewn any title to a "rent-charge"; and there is nothing to shew that the rent which is sold is, by virtue of sect. 11 of the *Lands Clauses Consolidation Act*, charged on the water-rates: the deed purporting to make the charge is silent upon this point. Under sect. 11 a limited owner could not sell for a rent-charge; and the special Act does not speak of a "rent-charge," but only of a "rent": the 11th section is not in any way expressly referred to in the special Act. It is doubtful whether the *Lands Clauses Consolidation Act* would warrant the purchase of a mere easement such as this: *Pinchin* v. *London and Blackwall Railway Company* (1).

Levett, in reply:—

When the *Lands Clauses Consolidation Act* is incorporated with a special Act empowering the promoters to purchase an easement, its clauses should be construed so as to include incorporeal hereditaments: *Great Western Railway Company* v. *Swindon and Cheltenham Extension Railway Company* (2).

CHITTY, J. (after disposing of some other objections raised by the purchaser not material for the purposes of this report, continued):—

The main argument was on the question whether the rent was charged on the water rates. That requires some examination, particularly of the Act of 1855 and the *Lands Clauses Act*. The conveyance of the easement and the reservation of the rent was made by the deed of April, 1856, as to the greater part of the aggregate rent which was sold. This deed refers to certain Acts of Parliament, including the *Lands Clauses Consolidation Act* and the Act of 1855. The grantor was a limited owner, that is to

(1) 5 D. M. & G. 851. (2) 9 App. Cas. 787, 801.

say, a person entitled for life; and in consideration of the yearly rent or payment reserved by virtue of the powers created expressly by reference to what is contained in the Act of 1855—that is, the *Liverpool Corporation Waterworks Act*—an easement is granted for the purpose of carrying water by a pipe, and the deed contains a reservation in the usual form of "yielding and paying therefor the yearly rent or sum of £250 by equal half-yearly payments." Sometimes the language is "yearly rent," and sometimes it is "yearly rent or sum," but nothing turns, in my opinion, upon that. It is declared that the yearly rent is to be accepted in full compensation for certain lands which are conveyed, and for all damage done, and then there is a covenant on the part of the corporation to pay the said yearly rent of £250. The deed contains no charge, in express terms, of the rent of £250 upon the water-rates.

Now, the argument for the purchaser is that, the deed being silent, there is no charge. On the 10th and 11th sections of the *Lands Clauses Act* much argument has been addressed to the Court. The 10th section runs thus, reading it shortly. It shall be lawful for any person seized in fee or entitled to dispose of absolutely for his own benefit any land, to sell and convey that land to the promoter, in consideration of an annual rent-charge payable by the promoters of the undertaking. That empowers the owner in fee simple, or a person standing in a similar position, to grant land in consideration of an annual rent-charge payable by the promoters of the undertaking. Whether that power was actually required in the case of an owner in fee simple I need scarcely stay to consider; but it is put into the Act plainly for the purpose of this 10th section in the words I am about to read, and for the purpose of the 11th section. The 10th section says: "Except as aforesaid, the consideration to be paid for the purchase of any such lands, or for any damage done thereto, shall be in a gross sum." Under that section, therefore, a limited owner could not sell, or convey, for a rent-charge. Then the 11th section creates a charge. I observe that the words in the 10th section are "an annual rent-charge." Now, "rent-charge" commonly understood means a rent issuing out of land charged thereon with a power of distress. That is not

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the meaning of the term "rent-charge" in this section, as is shewn by the following section which I am about to read. It does not mean that the rent-charge is charged necessarily on the land which is conveyed, because that would enable the person conveying the land to break up the undertaking, and any strict meaning that might be considered right to attribute to the words "annual rent-charge" in a general Act of Parliament is not applicable by reason of the 10th section. I am not saying that the promoters cannot create such a rent-charge; but that is not the rent-charge which is created by this Act of Parliament itself. Now, the 11th section of the *Lands Clauses Act*, 1845, is in these terms: "The yearly rents reserved by any such conveyance shall be charged on the tolls or rates, if any, payable under the special Act, and shall be otherwise secured in such manner as shall be agreed between the parties, and shall be paid by the promoters of the undertaking as such rents become payable." It is left to the parties to agree to some other charge, or other security than the charge, on the tolls or rates which are here mentioned; but, in the absence of any agreement one way or the other, and with a mere conveyance by the owner in fee simple under these two sections, the 11th section applies by its own force to the conveyance, and creates the charge on the tolls or rates, if any, payable under the special Act. That that is so I think is clear on the plain construction of the 11th section. It is not necessary that the conveyance should, in terms, create the charge, because the Act says that the yearly rents shall be charged on the tolls or rates. That that is so on the construction of the section alone is, I think, apparent; but if it be necessary to make it plainer, that is shewn by the 81st section, and the form in the Schedule B of what is termed a conveyance of a chief rent. "Chief rent" is not an appropriate term. Probably it was taken from the marginal note, which forms no part of the Act, to the 10th section, where "chief rent" happens to be mentioned. In this conveyance there is no mention whatever of the charge. If any corroboration is required, that corroborates the conclusion at which I have arrived on the reading of the two sections.

Then there comes the Act of 1855, which is a special Act, and

for the purposes of the 11th section (I am assuming for the moment that it applies) the term "special Act" means, by the definition contained in the *Lands Clauses Act*, 1845, the series of Acts which, looked upon as a whole, amount to the special Act, and the undertaking in this case would mean the undertaking which was authorized by the various special Acts of Parliament, and all of them would be included for the purpose of interpreting the term "special Act" in the 11th section.

Now, it is said that the landowner cannot grant an easement to the promoters of an undertaking, by virtue of the provisions of the *Lands Clauses Act*, 1845, as they stand, that there is a power simply to convey (this applies, of course, particularly to the case of a limited owner) the lands themselves—that is, the corporeal hereditament. Lord *Watson* was not of that opinion when advising the House of Lords in the case of *Great Western Railway Company* v. *Swindon and Cheltenham Extension Railway Company* (1). I, however, pass that by. I will assume in favour of the Respondent that he is right, and that, notwithstanding the wide terms of the interpretation clause of the Act of 1845, incorporeal hereditaments to be created *de novo* are not included. In making this assumption I am not to be understood to be expressing any opinion that the assumption is well founded.

Then I have to consider the 2nd and 3rd clauses of the special Act of 1855. That is an Act for amending the general Acts relating to the *Liverpool Waterworks* and for authorizing deviations, and for the construction of works and other purposes. The 2nd section recites that plans and sections, describing the lines and levels and situation of the works proposed to be executed under the authority of this Act, and the lands through which they go, have been deposited, and then it enacts: "That subject to the provisions of this Act, and with and subject to such of the powers and provisions of the recited Acts and of the Acts incorporated therewith as are not hereby altered or repealed"—I stay to mention that the Acts incorporated therewith include the *Lands Clauses Act*—"it shall be lawful for the mayor, aldermen, and burgesses to make and maintain the said works" which are described, and for that purpose to purchase

(1) 9 App. Cas. 801.

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either absolutely for a sum in gross, or at an annual or other rent, or to enter upon, take, and use such of the lands delineated on the said plans and referred to in the said book of reference as shall be necessary for that purpose, or any easement, privilege, power, or authority, in or over the same. That is to say, this enactment empowers the corporation, which represents the promoters of the undertaking, to buy, first, an easement, and, secondly, to buy it for an annual or other rent. This section on the very face of it has reference to the *Lands Clauses Consolidation Act*, and, assuming, what I have considered to be the construction of the Act as to an easement, the result is, that within the scope of the *Lands Clauses Act*, as modified by this enactment, the corporation can purchase an easement, and they can purchase an easement for an annual or other rent. That is a section empowering the corporation, so that the corporation could take the easement, and take the easement for a rent. Then the 3rd section deals with the other side of the same question, namely, the persons who can convey. This, again, is an empowering section. The *Lands Clauses Act* is again referred to, and, says the section, "The persons empowered by the *Lands Clauses Consolidation Act*, 1845, to convey lands"—that includes the owner in fee simple, who has an absolute power of disposition over the lands, and all the persons who are generally described as limited owners—"shall have full power to convey or grant in perpetuity, at an annual or other rent, any lands for the purposes of this Act, or the Acts incorporated herewith, or any easement, power, or authority, in or over such lands." The result of the 3rd section is to confer, upon the persons empowered by the general Act to convey lands, the power of conveying, first, an easement, and, secondly, at an annual or other rent as the consideration.

The result, therefore, appears to me to be this: I take these two sections and I read them in connection with the general Act relating to the same matters; and the two sections are a modification of the terms of the general Act; and taking the words of the 2nd section, which do not occur in so many words in the 3rd section, I think, having regard to the words in the 2nd section, "as are not hereby altered or repealed," and

even without those words, the Legislature is contemplating a modification of the terms of the general Act. Therefore, I must read the general Act and the special Act together, and put the right construction upon the two Acts, and discover the result.

Then there was some argument on the terms "annual or other rent," which terms do not coincide with the term "annual rent-charge" in the 10th section. The Act of 1855 speaks certainly of a rent. It does not say "rent-charge," but it is a "rent," and it speaks of a rent as an "annual or other rent." Now, a rent is not a mere sum of money without some security behind it. No lawyer would think of describing a sum of money payable for the use of a flock of sheep, or the like (referring to an old case on the subject) as a rent. At the same time, as already pointed out, the term "annual rent-charge" is not used in any strict technical sense in the general Act; and it appears to me that it is not used in any strict sense in this Act, but still that which is spoken of is a rent. As I have already shewn, on the construction of the 10th and 11th sections taken together, that is considered to be a yearly rent which is secured upon rates. I do not adopt the construction that was put on the two sections of the Act of 1855 by the Respondent. I do not think that "other rent" means a mere personal annuity. It must be a rent, and some "other rent" than an annual rent. I need not speak of an owner in fee, because he can deal with his own land as he likes, but, in my opinion, a limited owner cannot, by virtue of these two sections, grant an easement in consideration of a mere covenant to pay a sum of money.

That being so, the argument for the Respondent is of a highly technical nature in regard to the 11th section. It is that the 11th section is not in any way referred to expressly by the special Act of 1855, and that the language of the 10th and 11th sections, taken together and compared with the language of the 2nd and 3rd sections of the Act of 1855, produces such a result that the 11th section is dropped out. In my opinion, that is not the meaning of this special enactment. I think it is a modification of the general Act, and that I must read the two together. It appears to me it would be producing a result which I am satisfied was not contemplated by Parliament, if the Respondent is

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right, namely, that a limited owner could convey for a mere covenant to pay a sum of money. I find no difficulty in making the necessary alterations or modifications in the 11th section, and holding that the 11th section is intended to apply, and does apply, to the rent which is mentioned in the 2nd and 3rd sections of the Act of 1855. The passage in Lord *Watson's* speech in the case I have referred to appears to me to be again applicable. He says, speaking of the general Act (1): "When that Act is incorporated with enactments which expressly confer upon the promoters power to purchase and take incorporeal hereditaments by compulsion, I think its clauses ought by virtue of their new context to be construed so as to include and apply to hereditaments which are not corporeal." Then there is this passage, which is also pertinent to the present case: "It was, according to my apprehension, the purpose of the Legislature that the clauses of the general Act should be capable of expansion, so as to apply not only to the cases contemplated by that Act, but to all cases of purchasing and taking sanctioned by the provisions of any of the special Acts with which they were in future to be incorporated, subject, it may be, to the proviso that the words and expressions occurring in these clauses were not to be extended beyond the meanings severally assigned to them in sect. 3 of the Act." He is there dealing with the case of an easement, but the observation he makes is of a general nature, and I think it is a statement of the principle on which the Court should act in construing these special Acts which modify the terms of the general Act.

The result appears to me to be, that if under the general Act the owner in fee simple conveyed without taking any special charge on the tolls or rates payable under the special Act, yet the 11th section, by its own inherent force, would apply to the transaction, and I think the Legislature did not intend to put the limited owner on whom it was conferring this new power a power to sell an easement, which I will assume to be a new power, and to sell for an annual or other rent, which certainly was a new power, in any worse position than the *Lands Clauses Act* placed the owner in fee simple.

(1) 9 App. Cas. 801.

The result, therefore, is, that in this case, I think, notwithstanding the silence of the deed conveying the easement and reserving the rent, the 11th section, with the modification I have mentioned, does apply of its own force to the instrument, and, consequently, that the rent is secured by a charge upon the water-rates leviable by the corporation under their special Acts in relation to their waterworks undertaking.

W. C. D.

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The purchaser appealed. The appeal was heard on the 11th of July, 1894.

Byrne, Q.C., and *Theobald*, for the Appellant:—

The rent to which the vendor has shewn a title is not a "rent-charge," and is not, therefore, what the vendor contracted to sell. The question is, whether the *Lands Clauses Consolidation Act*, in conjunction with the special Act of 1855, makes the rent a "charge." Sect. 2 of the Act of 1855 empowers a limited owner to sell land or an easement to the corporation in consideration of "an annual or other rent" to be paid by the corporation. Sect. 10 of the *Lands Clauses Consolidation Act* (1) applies only to an owner in fee, and sect. 11 is ancillary to sect. 10, and applies only to a rent-charge, *i.e.*, a rent charged on and issuing out of land. There must be a rent-charge before sect. 11 can apply. Under sect. 10 a limited owner has no power to convey

(1) Sect. 10: "It shall be lawful for any person seised in fee of, or entitled to dispose of absolutely for his own benefit, any lands authorized to be purchased for the purposes of the special Act to sell and convey such lands or any part thereof unto the promoters of the undertaking, in consideration of an annual rent-charge payable by the promoters of the undertaking, but, except as aforesaid, the consideration to be paid for the purchase of any such lands, or for any damage done thereto, shall be in a gross sum."

Sect. 11: "The yearly rents reserved by any such conveyance shall be charged on the tolls or rates, if any, payable under the special Act, and shall be otherwise secured in such manner as shall be agreed between the parties, and shall be paid by the promoters of the undertaking as such rents become payable; and if at any time any such rents be not paid within thirty days after they so become payable, and after demand thereof in writing, the person to whom any such rent shall be payable may either recover the same from the promoters of the undertaking, with costs of suit, by action of debt, in any of the superior Courts, or it shall be lawful for him to levy the same by distress of the goods and chattels of the promoters of the undertaking."

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in consideration of a rent-charge. It may be that sect. 3 of the special Act enables a limited owner to do this, or that it enables any owner to convey in consideration of a rent which is not a rent-charge. The latter is what was actually done in this case. In sect. 2 of the *Lands Clauses Consolidation Acts Amendment Act*, 1860 (23 & 24 Vict. c. 106), which extends the provisions of sects. 10 and 11 of the *Lands Clauses Consolidation Act*, 1845, to persons under disability, the words used are "annual rent-charge."

[Lord Herschell, L.C., referred to *Earl of Jersey* v. *Briton Ferry Floating Dock Company* (1).]

In *Eyton* v. *Denbigh, Ruthin, and Corwen Railway Company* (2) it was held that the holder of rent-charges created by a railway company under sects. 10 and 11 of the *Lands Clauses Consolidation Act*, 1845, and charged on the undertaking of the company, had a first charge on the lands of the company comprised in the deeds of charge.

[Lindley, L.J.:—A "rent-charge" means a rent which can be distrained for. The Act 4 Geo. 2, c. 28, gives power to distrain for any rent.]

The language of the two deeds of March and April, 1856, is in substance identical, and there is nothing to shew that any charge was intended, "A rent-charge is where the owner of the rent hath no future interest or reversion expectant in the land; as where a man by deed maketh over to others his whole estate in fee simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress if the rent be in arrear. In this case the land is liable to distress, not of common right, but by virtue of the clause in the deed, and therefore it is called a 'rent-charge,' because in this manner the land is charged with a distress for the payment of it" (3).

[Davey, L.J.:—If there is a grant of land reserving a rent, the rent issues out of the land.]

That does not apply to an easement, and the two deeds must be construed in the same way.

[Davey, L.J.:—Is sect. 3 of the special Act anything more than

(1) Law Rep. 7 Eq. 409.
(2) Ibid. 439.
(3) *Shelford's* Real Property Statutes, 9th Ed. p. 105.

an extension to limited owners of the power which is given by sect. 10 of the *Lands Clauses Consolidation Act* to absolute owners?

Lord Herschell, L.C.:—Must we not read sect. 10 of the *Lands Clauses Consolidation Act* in conjunction with the law which gives the owner of a rent-seck the same right of distress as the owner of a rent-charge had at common law?]

As regards the easement, there is no charge.

Sect. 11 of the *Lands Clauses Consolidation Act* does not apply to a limited owner.

Levett, Q.C., and *T. C. Wright*, for the vendor:—

The purchaser's objection appears to be this—that the rent to which title is shewn is not a rent-charge at common law; that it cannot be recovered by distress; and that, therefore, the purchaser will not obtain that which he bargained for. The particulars of sale say nothing about a power of distress; but sect. 5 of the Act 4 Geo. 2, c. 28, gives such a power. A rent-charge granted by a deed containing no power of distress is, by reason of the power of distress conferred by that Act, a freehold tenement: *Dodds* v. *Thompson* (1). The words of sect. 11 of the *Lands Clauses Consolidation Act* are much larger than those of sect. 10. The term "rent-charge" is not used very strictly, and, indeed, in Sched. B to the Act the form of conveyance is called "Form of conveyance on chief rent," though in the form itself the term "rent-charge" is employed. In *Great Western Railway Company* v. *Swindon and Cheltenham Extension Railway Company* (2), Lord *Watson* (3) said that "when the *Lands Clauses Consolidation Act* is incorporated with enactments which expressly confer upon the promoters power to purchase and take incorporeal hereditaments by compulsion, I think its clauses ought by virtue of their new context to be construed so as to include and apply to hereditaments which are not corporeal. It was, according to my apprehension, the purpose of the Legislature that the clauses of the general Act should be capable of expansion, so as to apply not only to the cases contemplated by that Act, but to all cases of purchasing and taking sanctioned by the provisions of any of

(1) Law Rep. 1 C. P. 133. (2) 9 App. Cas. 787.
(3) 9 App. Cas. 801.

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the special Acts with which they were in future to be incorporated, subject, it may be, to the proviso that the words and expressions occurring in these clauses were not to be extended beyond the meaning severally assigned to them in sect. 3 of the Act." So, in the present case, sect. 11 of the *Lands Clauses Consolidation Act* must be read into the special Act, and its meaning modified accordingly. The fair construction will then be, that in every conveyance to the corporation, in consideration of a rent, in the form in Sched. B to the *Lands Clauses Consolidation Act*, without saying anything about a charge on the rates leviable by the corporation, the grantor will be entitled to the rights conferred by sect. 11. By sect. 3 of the Act of 1855 the Legislature intended to confer upon limited owners the same power of selling in consideration of a rent which is given by the *Lands Clauses Consolidation Act* to an absolute owner, and also to give power to both classes of owners to sell an easement in consideration of a rent-charge. The only difficulty in this construction is that at common law a rent cannot issue out of an easement. But, whether land or an easement over it is sold in consideration of a rent, the rent can equally by statute be charged upon the tolls and rates of the corporation. And, a power of distress being given by sect. 5 of the Act 4 Geo. 2, c. 28, the rent may properly be described as a "rent-charge."

Theobald, in reply:—

Sect. 11 of the *Lands Clauses Consolidation Act* applies only to a conveyance by an absolute owner under sect. 10.

LORD HERSCHELL, L.C.:—

Objection is taken to the title to a "rent-charge," purchased by the Appellant from the Respondent, on the ground that the vendor cannot make out a title to a rent-charge, and that, therefore, the subject-matter of the contract is not that to which the vendor has shewn a title. [His Lordship referred to the description in the particulars of sale, and continued:—]

The rent (except as to the sum of £1 5*s.*) was created by a deed dated the 5th of April, 1856. I will deal with that deed first. By it certain land was conveyed to the corporation of

Liverpool for the purposes of their waterworks, and there was reserved by the conveyance to the grantor a yearly rent of £250. There was a covenant by the corporation to pay that rent. The conveyance was by a limited owner, and therefore sect. 10 of the *Lands Clauses Act*, 1845, which was incorporated with the special Act of the corporation, did not in terms apply to such a case. But, in order to ascertain what was the effect of that reservation of rent, and what rights it gave, and how far the rent was charged upon the rates of the corporation, it is necessary first to examine the provisions of sect. 10 of the *Lands Clauses Act*, although in terms it applies only to the case of an absolute owner. [His Lordship read sect. 10.]

Much stress has been laid by the Appellant's counsel upon the use in that section of the word "rent-charge," as distinguished from a rent which is not a "rent-charge." I do not think that any stress was intended by the Legislature to be laid upon the term "rent-charge" as distinct from "rent." I think that the contrast was meant to be between a sale of land reserving a rent as its price and a sale of land for a sum in gross. Then sect. 11 provides that "the yearly rents reserved by any such conveyance" (and by "such conveyance" I understand a conveyance in consideration of an annual rent-charge payable by the promoters, and not a gross sum), "shall be charged on the tolls or rates, if any, payable under the special Act"; and then there is a provision enabling an action of debt to be brought against the promoters, if the rent is not paid within thirty days after it becomes payable, and also authorizing the levy of a distress of the goods and chattels of the promoters of the undertaking. Now, it appears to me that, whenever a rent is reserved as the consideration upon the sale of land to promoters, as distinguished from the payment of a sum in gross, that rent becomes *ipso facto* by sect. 11 charged upon the tolls or rates payable under the special Act, and, whenever land is sold reserving a rent, it appears to me that, since the Act of 4 Geo. 2, c. 28, that rent may properly be called a "rent-charge," for under sect. 5 of that Act there has become incident to it the right of distress. On the conveyance of land reserving a rent, it was the right of distress which made the rent a "rent-charge." In the case, therefore,

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of a sale of land under sect. 10 reserving rent, it appears to me that there is no difficulty in saying that it is a rent-charge, and, consequently, sect. 11 would in terms apply to such a case.

So far I have dealt with the case of an absolute owner, and, but for the special Act of 1855, under which this land was sold, it seems clear that there was no power for a limited owner to convey land in consideration of a rent. But by sect. 2 of the Act of 1855 it is expressly provided that, "subject to such of the powers and provisions of the recited Acts and of the Acts incorporated therewith" (that is, the *Lands Clauses Act* amongst others), "as are not hereby altered or repealed, it shall be lawful" for the corporation "to purchase either absolutely for a sum in gross, or at an annual or other rent," such of the lands mentioned in the book of reference as shall be necessary, "or any easement . . . . in or over the same." Then by sect. 3: "The persons empowered by the *Lands Clauses Consolidation Act*, 1845, to convey lands shall have full power to convey or grant in perpetuity, at an annual or other rent, any lands for the purposes of this Act, or the Acts incorporated herewith, or any easement . . . . in or over such lands."

In construing those two sections, it is necessary to bear in mind what were the powers existing at the time at which that Act was passed. Under the previous Acts, which incorporated the *Lands Clauses Act*, including sects. 10 and 11, an absolute owner could at that time convey land in consideration of either a rent-charge or a sum in gross. There was, therefore, no occasion to give, and it is not to be supposed that this Act was designed to give, any power which already existed by virtue of the prior Acts. It is, I think, clear that the object of this amending Act of 1855 was twofold—viz. (1.), to give to limited owners the same power of selling in consideration of a rent-charge in lieu of a sum in gross which an absolute owner already had, and (2.) to enable an easement also to be purchased for either a sum in gross or a rent-charge.

Dealing, then, first with the case of a limited owner, it seems to me, that, reading this Act together with the Acts which are incorporated with it, and having regard to the amendment which one must conceive it was intended to make in the then existing

law, the effect of it is to place a limited owner in precisely the same position as that in which an absolute owner was by virtue of sect. 10 of the *Lands Clauses Act*, and, consequently, when a sale is made by a limited owner in consideratioon of a rent, in lieu of a sum in gross, sect. 11 applies to that rent, and charges it upon the tolls or rates. It is hardly conceivable that anything else should have been intended by the Legislature. If that be so, it is clear that as regards the whole of the rent-charge with which I have so far dealt, viz., that which was created by the deed of the 5th of April, 1856, it is properly described as a "rent-charge," because it is charged upon the rates leviable under the special Acts of the corporation.

But part of the subject-matter of the sale was a rent of £1 5*s*., which was created by another deed of the 31st of March, 1856, and that was a rent payable as the consideration for the sale to the corporation of an easement, which, of course, could only have been effected under the provisions of sects. 2 and 3 of the Act of 1855. It is said that, though rent may issue out of land, it cannot properly issue out of an easement. That would no doubt be true at common law. But when the Legislature, obviously having in view sects. 10 and 11 of the *Lands Clauses Act*, without making any special provisions as to the effect of a conveyance, provided that an easement might be sold, reserving as the consideration (just as in the case of land), a rent, instead of a payment in gross, can there have been any other intention than that the provisions of sect. 11 should apply to such a rent, even although perhaps it could not be, strictly speaking, termed a "rent-charge"? Looking at sects. 2 and 3 of the Act of 1855, I cannot think that any other than that was the intention of the Legislature, and, if that be so, it disposes of the case of the Appellant.

For these reasons I think that the judgment of Mr. Justice *Chitty* was right, and that it ought to be affirmed.

LINDLEY, L.J.:—

I am entirely of the same opinion, and I will only add a few words. It appears to me that this appeal is based upon a misconception of the expression "rent-charge" in sect. 10 of the *Lands Clauses Act*. Bearing in mind what was done by the Act

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4 Geo. 2, c. 28, which by sect. 5 gave a power of distress for all rents, there is now no magic in the word "rent-charge." Whether you speak of a "rent-charge" or only of a "rent," if it is a rent and not merely a sum covenanted to be paid, seems to me to be utterly immaterial, because under the Act of Geo. 2 you have a power of distress in respect of it; and any rent in respect of which you have a power of distress certainly appears to me to be a "rent-charge" within the meaning of the *Lands Clauses Act*. An attempt has been made to put upon the expression "rent-charge" a narrower meaning than it will bear. The rest of the case is easy, and I will only add that I take the same view of the construction of the Act as the Lord Chancellor does.

Davey, L.J.:—

I think a great deal too much stress has been laid upon the use of the words "annual rent-charge" in sect. 10 of the *Lands Clauses Act*. It was strictly accurate to use in that section, limited as it was to a sale of land by an absolute owner, the word "rent-charge." Either it was a "rent-charge" because there was an express right to distrain, or, even if it was in law a rent-seck, there would by the Act of Geo. 2 be a right to distrain attached to it, and it would therefore fall within the definition of "rent-charge." But, even if that were not so, it is to be observed that sect. 11 does not use the word "rent-charge"; it says: "The yearly rents reserved by any such conveyance shall be charged on the tolls or rates"; and I think that, even if it were not a "rent-charge" properly so called apart from sect. 11, it would be strictly accurate to call it a "rent-charge" in sect. 10, and to read sect. 11 as defining that upon which it was to be charged, and the rights which were given for the purpose of making that charge effectual.

I agree with the other members of the Court that sect. 3 of the Act of 1855 must be construed as extending the provisions of sect. 10 of the *Lands Clauses Consolidation Act* to a limited owner, so as to give such an owner power to sell either land or an easement in consideration of a rent, and it should be observed that it is to be "at an annual or other rent." Mr. *Theobald* says, you cannot reserve a rent out of an easement. No doubt a

subject could not do so at common law; but the King could, even at common law, and the subject may do it by statute. And, although there may be no power of distress attached to it, it is a "rent"—that is, a rent issuing out of the subject-matter of the conveyance—a rent reserved out of the grant made by the conveyance. I think the effect of the Act of 1855 is to make sects. 10 and 11 of the *Lands Clauses Consolidation Act* applicable to a sale by a tenant for life or other limited owner of any land or any easement to the *Liverpool* Corporation in consideration of an annual or other rent.

Solicitors: *Maples, Teesdale & Co.*, agents for *Oppenheim & Malkin, St. Helen's; Meynell & Pemberton.*

W. L. C.

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[1893 H. 4336.]

Power of Appointment—Revocation—Joint Appointment—Revocation by Survivor.

By a marriage settlement certain funds were settled upon trust for the children of the marriage in such shares and in such manner as the husband and wife during their joint lives by deed, with or without power of revocation and new appointment, should appoint; and in default of and subject to such joint appointment, then as the survivor of them should by deed, with or without power of revocation and new appointment, or by will, appoint. The husband and wife made a joint appointment of part of the trust funds, with a proviso that the appointment thereby made was made "subject to the power of revocation and new appointment mentioned in the settlement."

After the death of the wife, the husband executed a deed revoking the joint appointment and making a new appointment of the fund:—

Held (affirming the decision of *North*, J.), first, that the husband and wife had power in their joint appointment to reserve a power of revocation and new appointment to the survivor.

Secondly, that such a power of revocation and new appointment was effectually reserved in the joint appointment.

Brudenell v. *Elwes* (1) and *Dixon* v. *Pyner* (2) followed.

BY a settlement made on the marriage of the Rev. *J. W. Harding* and *Elizabeth*, his wife, on the 8th of December, 1846,

(1) 1 East, 442. (2) 55 L. J. (Ch.) 566.

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it was declared, among other things, that the trustees should stand possessed of certain trust funds, which had been transferred into their names, upon trust for the said *J. W. Harding* and *Elizabeth*, his wife, during their respective lives, and after the decease of the survivor, if there should be any children of the marriage—which event happened—upon trust for such children or their issue born in the lifetime of the said *J. W. Harding* and *Elizabeth*, his wife, in such shares and at such times and in such manner as the said *J. W. Harding* and *Elizabeth*, his wife, during their joint lives, by any deed or deeds by both of them legally executed, and either with or without power of revocation and new appointment, should from time to time appoint; and in default of and subject to such joint appointment, then as the survivor of them, the said *J. W. Harding* and *Elizabeth*, his wife, should, after the death of the other of them, by any deed or deeds by him or her legally executed, with or without power of revocation and new appointment, or by his or her last will and testament, or any codicil or codicils thereto in writing, from time to time appoint; and in default of and subject to such joint or other appointment as aforesaid, in trust for all and every the child or children of the marriage who should attain the age of twenty-one years, or being a daughter or daughters should marry under that age, in equal shares, if more than one.

There were four children of the marriage, namely, *Egerton B. Harding*, who was unmarried; *Beatrice*, the wife of *Alfred G. Allen*, who had several children; *Georgiana*, who died unmarried; and *Mary*, the wife of *Edward Lloyd*, who had several children.

By a deed-poll dated the 30th of January, 1881, *J. W. Harding* and *Elizabeth*, his wife, after reciting the joint power of appointment given to them by the settlement, but not the power given to the survivor of them, and reciting two previous irrevocable joint appointments of two sums of £2000, in pursuance of the power reserved to them in the settlement, appointed that, after the decease of the survivor of them, the unappointed residue of the said trust funds should be held upon the trusts thereinafter declared, which were for the benefit of their son *Egerton B. Harding*, their daughters *Georgiana*, *Beatrice*, and *Mary*, and

certain of their issue. The deed contained the following clause: "The appointments made by these presents are made subject to the power of revocation and new appointment mentioned in the hereinbefore recited indenture."

Elizabeth Harding died on the 10th of February, 1881. By a deed-poll dated the 10th of March, 1886, which was expressed to be supplemental to the deed of settlement, and to the three previous deeds of appointment, the said *J. W. Harding*, in exercise of the power reserved to him by the said deed-poll of the 30th of January, 1881, and of all other powers, revoked the appointment contained in the last-mentioned deed-poll, and appointed the residue of the funds comprised therein upon certain other trusts for the benefit of his son and daughters. And the deed contained a proviso reserving to the said *J. W. Harding* the power of revoking the appointment thereby made by any deed, or by his last will or any codicil thereto.

J. W. Harding died on the 6th of June, 1893. The trustees of the settlement took out a summons asking for the opinion of the Court whether *J. W. Harding* had power after the death of his wife to revoke, and whether he had effectually revoked, the joint appointment of the 30th of January, 1881.

The summons was heard before Mr. Justice *North* on the 24th of April, 1894.

B. B. Rogers, for the trustees, stated the case.

S. Hall, Q.C., and *Butcher*, for *E. B. Harding*:—

The joint appointment made by the husband and wife by the deed of the 30th of January, 1881, was not revocable by the husband as survivor. That deed recited the original settlement only so far as the end of the joint power of appointment. The separate power given to the survivor is not recited. The appointment is made in exercise of the power—that is, of the joint power. The appointment is made "subject to the power of revocation and new appointment mentioned in" the settlement. Under this reservation the survivor alone could not revoke the joint appointment. When two persons make a joint appointment, the joint power being alone recited, the fair construction

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is, that they intend to reserve only a joint power of revocation. They might reserve a power of revocation to themselves or to the survivor; but this has not been done here. It will, no doubt, be said that *Brudenell* v. *Elwes* (1), *Dixon* v. *Pyner* (2), and *Burnaby* v. *Baillie* (3), are in favour of the validity of the revocation and new appointment by the husband, but those cases are all distinguishable from the present. In *Brudenell* v. *Elwes* the power of appointment was given by the settlement to the husband and wife, or the survivor of them, with or without power of revocation. In *Dixon* v. *Pyner* the joint appointment expressly reserved a power of revocation and new appointment to the survivor. In *Burnaby* v. *Baillie* it was held that the reservation in a joint appointment of a power of revocation and new appointment to the husband alone was invalid. The power of appointment given to the survivor is "in default" of and subject to such joint appointment. "In default of" means, if there is no joint appointment in existence, either because none has ever been made, or because one has been made and has been wholly revoked. "Subject to" points to a joint appointment which does not exhaust the fund or which fails in part. The power to the survivor does not arise at all if the joint power has been fully exercised. In the joint appointment there is no reservation of a power of revocation to the survivor. In fact, there is no reservation of any power to revoke; there is only a reference to the power contained in the settlement. There is no power of revocation contained in the settlement; it contains only a power to reserve such a power. A power of revocation must be expressly reserved in the deed exercising the power of appointment: *Sugden* on Powers (4).

Swinfen Eady, Q.C., and *George Lawrence*, for Mrs. *Lloyd* and her trustees:—

The husband and wife might have reserved a power of revocation to themselves or to the survivor of them, and this is what they have in effect done. The words used are a compendious incorporation into the deed of joint appointment of all the

(1) 1 East, 442.
(2) 55 L. J. (Ch.) 566.
(3) 42 Ch. D. 282, 301.
(4) 8th Ed. p. 387.

powers contained in the settlement. The reason why only the joint power of appointment is recited is, that that power alone is being exercised; but the subsequent reference is, not to the power recited, but to the power of revocation and new appointment contained in the settlement. *Dixon* v. *Pyner* (1) is an authority directly in point. The language used there is in substance identical with that used here.

Method, for Mrs. *Allen*.

S. Hall, in reply.

NORTH, J.:—

In my opinion the power was well exercised by the deed of the 10th of March, 1886. I agree entirely with what Mr. Justice *Kay* said in *Dixon* v. *Pyner*, a case which, I think, is practically undistinguishable from the present case. There is very little difference between the language used in the two cases, and I concur with Mr. Justice *Kay* as to the principle. A power of appointment among the children of the marriage is given to the father and the mother during their joint lives, with or without power of revocation and new appointment, and, in default of and subject to such joint appointment, to the survivor, and in default of any appointment the fund is to be divided among the children equally. This power is given for the benefit of the children. Circumstances may render it very unfair that the children should take equally. The circumstances of the children may be different—sons, for instance, may require larger shares than daughters. Then, again, after an appointment has been made circumstances may change before it takes effect. The practice, therefore, has arisen in marriage settlements of enabling the parents to change their minds with the change of circumstances. This is all done for the benefit of the children, not of the parents; the parents cannot exercise the power for their own benefit. One can, therefore, quite understand the reason why power should be given to the parents to revoke an appointment which they have made, and, moreover,

(1) 55 L. J. (Ch.) 566.

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why this power should not be lost if one of the parents is dead. It is the practice, therefore, to give a power of appointment and of revocation to the survivor. I cannot see why a rigid line should be drawn at the death of one parent, and that what has been previously done under the power should be stereotyped then. It seems to me in principle quite right that a power of revocation and new appointment should be given to the survivor, as well as to the two parents during their joint lives. This has been carried out in practice in cases such as *Brudenell* v. *Elwes* (1). It is true that there the power was given to the husband and wife, or the survivor of them, whereas here the power to the survivor is not given *uno flatu* with the joint power, but there are two separate powers. I do not think that affords any real distinction, nor can I see any real difference between the present case and *Dixon* v. *Pyner* (2). In my opinion, the husband and wife had power in the present case to reserve in the joint appointment a power of revocation and new appointment to the survivor.

But it is said that, if they had power to reserve a power of revocation and new appointment to the survivor, they have not done so. I think it is clear that they have. They certainly intended to do it. No doubt proper words must be used to shew an intention that an appointment shall be revocable; but I cannot imagine how the words used here can have any other meaning than that the appointment shall be revocable by virtue of the power of revocation and new appointment mentioned in the settlement. It is said that the word used is "power," not "powers," and that that refers only to the joint power. I do not so read it. I think the words are equivalent to "subject to such power of revocation and new appointment as is mentioned in" the settlement—that is, such power as can be reserved under the settlement. In my opinion, the power has been well exercised by the surviving husband.

W. L. C.

C. A. From this judgment *E. B. Harding* appealed. The appeal was heard on the 12th of July, 1894.

(1) 1 East, 442. (2) 55 L. J. (Ch.) 566.

Cozens-Hardy, Q.C., and *Butcher*, for the Appellant, contended, first, that there was no power under the settlement for the husband or wife, in exercising their joint power of appointment, to reserve a power of revocation or new appointment to the survivor, the two powers being kept distinct in the settlement, in which respect the case was distinguishable from *Brudenell* v. *Elwes* (1); and, secondly, that if there was such power, the husband and wife had not in fact reserved a power of revocation and new appointment to the survivor. They also referred to *Dixon* v. *Pyner* (2) and *Sugden* on Powers (3).

Swinfen Eady, Q.C., and *George Lawrence*, for Mrs. *Lloyd* and her trustees, were not called on.

Methold, for Mrs. *Allen*.

B. B. Rogers, for the trustees of the settlement.

LORD HERSCHELL, L.C.:—

The appeal which has to be determined is an appeal from a declaration that the appointments made by the deed-poll of the 30th of January, 1881, were revocable appointments, and were revoked by *John Harding* after the death of his wife by a deed of the 10th of March, 1886.

The power of appointment exercised by the deed of 1881 was conferred by the marriage settlement between *John W. Harding* and his wife of the 8th of December, 1846. By that settlement a power of appointment was reserved to the husband and wife during their joint lives by any deed or deeds, by both of them legally executed, and either with or without power of revocation and new appointment, the appointment to be among the children of the marriage. The deed then continues: "And in default of and subject to such joint appointment then as the survivor of them shall after the death of the other of them by any deed or deeds by him or her legally executed, with or without power of revocation and new appointment, or by his or her last will or any codicil or codicils thereto in writing, from time to time appoint."

(1) 1 East, 442. (2) 55 L. J. (Ch.) 566.
(3) 8th Ed. p. 387.

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On the 30th of January, 1881, the husband and wife, in pursuance of the power conferred upon them by the deed, made an appointment, the nature of which it is not necessary to state. By that deed (clause 7) it was declared that "the appointments made by these presents are made subject to the power of revocation and new appointment mentioned in the hereinbefore recited indenture," the indenture being the marriage settlement of 1846. After the death of the wife, the husband, by a deed duly executed, did revoke that appointment. It is contended that he had no power to do so on two grounds—first, that the power to revoke could only be reserved to the husband and wife jointly in respect of the joint appointment made; and, secondly, that, even if it could have been reserved to the survivor of them, it had not been effectually so reserved.

In the case of *Brudenell* v. *Elwes* (1), under marriage articles power was reserved to appoint the estates as the husband and wife, or the survivor of them, should, from time to time, either with or without power of revocation, direct, limit, or appoint. A joint appointment was made by the two, and the question was, whether that could be revoked by the survivor. It was contended that the joint appointment could only be revoked by the two. Lord *Kenyon* said: "I see no reason to doubt but that the appointment by the wife alone, by the deed of 1773, was a good appointment as far as it is warranted by the power, and that it is a good revocation of the appointment of 1768. The marriage articles meant to give a joint power of appointment to the husband and wife during their lives, and, after the death of either, that the survivor should have equal power to revoke and make a new appointment. It seems clear that an equal degree of confidence was reposed in both husband and wife; and as it could not be foreseen what alterations the exigencies of the family might from time to time require, it was thought more prudent to leave the survivor of them, whichever it might be, the same power to mould the appointment that had been committed to both while living." That seems to me to indicate the principles which should guide, if there be any ambiguity, in the construction of a marriage settlement of this description.

(1) 1 East, 442, 454.

But, it is said, in the present case the power of appointment and revocation is not, as in the case of *Brudenell* v. *Elwes* (1), a single power, but that there are two separate powers, the one the joint power, and the other the power to the survivor reserved by the deed. I think that there is a fallacy involved in that. No doubt, in the present case, the powers of appointment given are defined in what may be termed two separate clauses, whereas in *Brudenell* v. *Elwes* they were comprised in a single clause. But where power is given to two persons, and a power is given to the survivor, that is two powers, whether you insert the two powers in a single clause, or separately in two separate clauses; it is not the mode of drafting which makes them two powers. In substance, they are two powers in the one case as they are in the other. I, therefore, do not see really any substantial distinction between this case and *Brudenell* v. *Elwes*.

Then I turn to the words of the settlement. The power is given to make the appointment with or without power of revocation. It does not say revocation by them; and the question is, on the true construction of the provisions of the deed, was it intended that the power of revocation should be confined to a power of revocation by the two jointly, or that there should be a power of revocation by the survivor, supposing the power to the survivor be reserved. I cannot myself doubt that it was the intention of the framers of this settlement that there should be, in the case of the exercise of the joint power, a power of revocation by the survivor, if that was duly reserved.

Then the question remains whether such a power of revocation was reserved by the deed of 1881. The deed of 1881, after making the appointment, provides, as I have said, "that the appointments are subject to the power of revocation and new appointment mentioned in the hereinbefore recited indenture." What is the power of revocation reserved? For the purpose of seeing what is reserved, you are thrown back on the provisions of the indenture; and it seems to me, upon the true construction of clause 7, whatever power could be exercised in pursuance of and in conformity with the trusts of the settlement is reserved by the conditions of that clause. The only suggestion which was

(1) 1 East, 442.

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urged to the contrary was founded upon the fact, that, in the recital in this deed of 1881, reference was only made to the power of joint appointment, and to the words of revocation which follow it, and there was no reference to the power given to the survivor. It seems to me it would be impossible to give such effect as is contended for to the recitals, and, by reason of them, to cut down what appears to me to be plainly the proper construction of the provisions contained in the 7th clause.

For these reasons I think the judgment appealed from is right, and ought to be confirmed.

LINDLEY, L.J. :—

I am of the same opinion. The utmost extent to which I could go with the counsel who have argued this case for the Appellant is that it is just possible to read this power as two powers instead of one. But if you do read them as two and also construe them as the counsel for the Appellant desires, the result will be to defeat the real object of the parties. What is the object which everybody has in framing a settlement of this kind? It is to give the husband and wife a joint power, and, after the death of either, to give the survivor the power of revoking the old appointment and making a new appointment according to the exigencies of the family. It is impossible to see what may happen twenty or thirty years after the parties marry; and the object of the husband and wife, while they are living, is that they shall have the power to modify the settlement. Mr. *Hardy's* construction defeats that object; whereas the construction put on this clause by the learned Judge carries it out. Which are we to take? Are we to say that because a clause is framed so that it may be possibly read two ways we must read it so as to defeat the object? The Appellant's argument is far too subtle and paradoxical. I am satisfied it is wrong. The reasons for that opinion I need not repeat. The truth is, the moment you grasp the principle affirmed in *Brudenell* v. *Elwes* (1), and carried out, I will not say extended, in *Dixon* v. *Pyner* (2), this case is clear.

(1) 1 East, 442. (2) 55 L. J. (Ch.) 566.

DAVEY, L.J.:—

I cannot bring my mind to feel any serious doubt about this case. Mr. *Hardy's* first point was that there were two powers, and not one power. That is true; but, wherever you have a joint power for two persons to appoint, followed in default of such joint appointment by a power to one to appoint, they are two powers; and I observe that, even in *Brudenell* v. *Elwes* (1), Lord *Kenyon* accurately, as I think, treated it as two powers. He says (2): "The marriage articles meant to give a joint power of appointment to the husband and wife during their lives, and, after the death of either, that the survivor should have equal power to revoke and make a new appointment." It is always two powers in whatever language you couch the power, whether in the succinct and short form used in *Brudenell* v. *Elwes*, or in the more elaborate form in use by conveyancers in the present day. It appears to me, when you once grasp the principle of *Brudenell* v. *Elwes*, this case is at an end, because *Brudenell* v. *Elwes* decided, and I may add Lord *St. Leonards* approved of the decision, that where you have a joint power to appoint by deed with or without power of revocation, that reserves the power of revocation either to the joint appointors or the survivor.

That being so, we are asked, What is the meaning of these words, "Subject to the power of revocation or new appointment mentioned in the hereinbefore recited indenture"? It means whatever power of revocation or new appointment could be reserved consistently with the first of the thereinbefore recited indentures. Mr. *Butcher* says there is nothing to shew the intention to reserve a power of revocation. I should rather reply that it is on those who wish to restrict the meaning of those words to shew why they should receive a narrower construction than that which is the natural construction and meaning of the words. Mr. *Butcher* relied on the recital. I do not attach any importance to that. When conveyancers are drawing an appointment it is usual to recite so much of the settlement as shews the power they mean to exercise, and that is what is done in the present case. We should be defeating the object of this settlement, which was to reserve to the husband and wife, and the

(1) 1 East, 442. (2) 1 East, 454.

C. A. 1894 *In re* HARDING. ROGERS *v.* HARDING.

survivor, power to mould the trusts of this trust fund to suit the exigencies of the family from time to time as they arose, and we should be defeating the object of the appointors in 1881, if we acceded to the argument of the Appellant. The appeal must be dismissed.

Solicitors: *Meredith, Roberts, & Mills; Hulberts & Hussey; Wade & Lyall; Walters, Deverell & Co.*

M. W.

C. A. 1894 KEKEWICH, J. *May* 8. C. A. *July* 12, 13.

ROSS *v.* WHITE.

[1891 R. 462.]

Partnership Action—Further Consideration—Costs of Action how Payable—Debt from Partnership to one of the Partners—Priority.

The costs of a partnership action, being costs of administration, are payable out of the assets remaining after the rights of the partners have been adjusted, and a clear amount ascertained which is divisible between them according to their respective interests in the partnership.

Where, therefore, on the further consideration of a partnership action it appeared that there was a debt owing to one partner on loan account, and a larger balance in respect of capital due to him than was due to his co-partner, the Court *held* that a fund in Court representing the partnership assets ought to be applied, first, in payment of the debt, secondly, in payment of the excess of the balance due to the one partner over the balance due to the other, and, thirdly in payment, so far as it would extend, of the costs of the action, and that the rest of the costs should be borne by the partners in proportion to their interests in the partnership.

The decision of *Kekewich*, J., affirmed.

FURTHER CONSIDERATION.

This was an action by one partner against his co-partner for a dissolution and winding up of the partnership, and the appointment of a receiver and manager. The business of the firm was that of wine and spirit merchants, carried on at *Cardiff*. By the terms of the partnership the partners shared equally in profits, and each of them contributed the sum of £1750 as capital.

On the 20th of March, 1891, upon a motion for the appointment of a receiver, by consent of the parties, the motion was treated as the trial of the action, and the Court gave judgment

appointing a receiver, declaring the partnership dissolved, and directing an account of all dealings and transactions between the Plaintiff and Defendant as co-partners, an inquiry of what the credits, property, and effects then belonging to the partnership consisted, and a sale of the partnership property and effects; and the further consideration of the action was thereby adjourned.

The Chief Clerk by his certificate dated the 26th of February, 1894, certified that he had taken the account directed by the judgment, and that the result of such account was, that there was due from the partnership to the Plaintiff the sum of £1405, and from the partnership to the Defendant the sum of £804. He further certified that the only debt of the partnership was one to the Plaintiff on a loan account, and that there was then due to the Plaintiff in respect of such debt for principal and interest the sum of £649.

The action came on to be heard on further consideration before Mr. Justice *Kekewich* on the 8th of May, 1894.

The assets of the partnership consisted of a sum of Consols in Court and a balance due from the receiver, together amounting to about £1371. An account was produced shewing the drawings of the partners, and the amounts debited to each partner in respect of such drawings. There was no allegation of misconduct on the part of either partner.

By the minutes of the order on further consideration, submitted on behalf of the Plaintiff, it was proposed that the fund in Court should be applied in the first instance in paying the debt of £649 due to the Plaintiff, and that the balance should be divided between the Plaintiff and Defendant in certain proportions to be specified in the order, and that the costs of the Plaintiff and Defendant should be taxed, and, "the Court being of opinion that the aggregate amount of such costs ought to be borne by the Plaintiff and the Defendant equally," the Taxing Master was to certify what sum was due from either of the parties to the other, and the same was to be paid accordingly.

On behalf of the Defendant these minutes were objected to, and it was proposed that after the direction for payment of the £649 to the Plaintiff a direction should be inserted for the

C. A. 1894 ROSS v. WHITE.

taxation of the costs of the Plaintiff and Defendant, and for the payment of the same out of the fund in Court.

Dunham, for the Plaintiff:—

The costs of the action ought to be borne by the partners equally, according to the principle of *Hamer* v. *Giles* (1), *Austin* v. *Jackson* (2), and *Potter* v. *Jackson* (3). The proper way of working that principle out is to tax the Plaintiff's and Defendant's costs, add the two amounts together, and direct each party to pay a moiety of the aggregate amount. The Court expresses an opinion that the costs ought to be borne by the partners equally, and the Taxing Master certifies the balance due from the one to the other of the parties.

S. Dickinson, for the Defendant:—

It is now well settled that the costs of a partnership action are paid before any return of capital is made to the partners, and therefore, in this case, after the payment of the debt of £649 due to the Plaintiff, the costs ought next to be paid. This is in accordance with the view intimated in *Lindley* on Partnership (4), referring to sect. 44 of the *Partnership Act*, 1890, whereby it is provided that in settling accounts between partners after a dissolution, "the assets of the firm including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order: 1. In paying the debts and liabilities of the firm to persons who are not partners therein: 2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital: 3. In paying to each partner rateably what is due from the firm to him in respect of capital: 4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible." And see *Binney* v. *Mutrie* (5), where there is an elaborate statement of the order in which the assets were to be applied in a partnership suit, from which it appears that the costs were paid together

(1) 11 Ch. D. 942.
(2) Ibid. 942, n.
(3) 13 Ch. D. 845.
(4) 6th Ed. p. 600.
(5) 12 App. Cas. 160, 165, 166.

with debts, liabilities, and rents before the surplus assets were dealt with according to the rights of the partners.

In *Austin* v. *Jackson* (1) the question was whether the costs ought to be paid before a debt due to a partner, and it was decided that the partner's debt came first. We admit that the debt due to the Plaintiff must have priority. It was not suggested in that case that the partner's capital should be distributed before the costs were paid. Such a suggestion would have been contrary to the elementary principle that the costs of a partnership action are to be treated as costs of administration; until they are paid there can be nothing to distribute between the partners. In the present case the order of administration should be as follows: first, pay the £649; secondly, pay the costs; thirdly, let each partner contribute such a sum as together with the remaining assets in hand will make up the full amount of the undrawn capital, and then each of the partners must be paid the amount of capital standing to his account. The certificate of the Chief Clerk, finding amounts "due" to the Plaintiff and Defendant, must be read with reference to the account directed by the judgment. There is a clear distinction between sums due to a partner as a creditor, and sums due to him in respect of the capital of the joint adventure. In *Austin* v. *Jackson* and *Hamer* v. *Giles* (2) the Master of the Rolls speaks of the balance due to the partner as a "debt." A right in respect of capital is not a debt. So in *Potter* v. *Jackson* (3), though it does not clearly appear from the report, the balance referred to by the Vice-Chancellor as due to a partner must have been an advance in the nature of a loan, and not a mere balance on account of capital; and, if necessary, I would ask your Lordship to give me an opportunity of referring to the record of that case.

[KEKEWICH, J., referred to *Seton* on Judgments (4), and to the case of *Rosher* v. *Crannis* (5) there cited.]

Rosher v. *Crannis* is merely to the same effect as *Potter* v. *Jackson*. All the cases go to shew that the costs of a partnership

(1) 11 Ch. D. 942, n.
(2) Ibid. 942.
(3) 13 Ch. D. 845.
(4) 5th Ed. vol. iii. p. 1812.
(5) 63 L. T. (N.S.) 272.

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action are costs of administration, which must be paid out of the partnership assets before the balance ultimately divisible is ascertained.

Dunham, in reply:—

Austin v. *Jackson* (1) is directly in point, and is a clear authority to shew that the costs of a partnership action must be borne by the partners in proportion to their shares in the profits, that is, in this case, equally. Such a rule is consonant with reason and sound principle. There is no reasonable ground for drawing any distinction between a sum due from one partner to another in respect of a loan, and a sum due from the one to the other in respect of capital. The one sum is as much a debt as the other. In *Austin* v. *Jackson*, as in this case, the account directed was the ordinary account of partnership dealings and transactions. In *Lindley* on Partnership (2) it is said that "the partnership debts and liabilities including sums due from the firm to the partners in respect of advances or the like must be paid out of the assets in priority to the costs." It is obvious that the words "or the like" must refer to capital. After the £649 due to the Plaintiff the rights of the partners ought to be adjusted, and that must be done by requiring each partner to contribute a sum sufficient to make up the full amount of the capital.

[Kekewich, J.:—I do not see the necessity for that. The Plaintiff, roughly speaking, has received £600 less than the Defendant has received. After the £649 has been paid, apply the residue of the fund in payment of the £600, and then the surplus, if any, will be available for costs.]

And the deficiency will be made good by ordering each to pay a moiety, leaving it to the Taxing Master to adjust the amount.

Kekewich, J.:—

My task, as it seems to me, is to ascertain on what principle the cases on this subject have been decided, or perhaps I should rather say, on what principle the authorities are based, because I include among the authorities the passages to which I have been

(1) 11 Ch. D. 942, n. (2) 6th Ed. p. 520.

referred in the Lord Justice *Lindley's* work on Partnership (1); though, in truth, in the passage last cited he is only quoting the *Partnership Act*, 1890. The cases are *Hamer* v. *Giles* (2) and *Austin* v. *Jackson* (3), decided by the late Master of the Rolls; *Potter* v. *Jackson* (4), decided by the Vice-Chancellor *Hall*; and *Rosher* v. *Crannis* (5), decided by Mr. Justice *Chitty*. The general principle and the general rule founded thereon are clear. The rule is that the costs of a partnership action are on the same footing as costs of administration, and therefore come out of the subject-matter of administration—in other words, the partnership assets. But then arises the question as to what is to be done supposing there are no partnership assets, or the partnership assets are insufficient to pay the costs. In any such case as that the proper course, according to *Austin* v. *Jackson* and the other decisions, is to apply the assets, so far as they will extend, in payment of the costs, and the balance of the costs must be contributed by the partners in the proportion of their interests in the partnership, which in the present case are equal. So far there is no difficulty at all; but the difficulty arises when you have to grapple with the question how the partnership assets are to be determined—that is, how it is to be ascertained what are the assets out of which the costs are to be paid. It is settled by the cases referred to that if a sum is due to either partner in respect of a loan to the partnership, or what is equivalent to a loan to the partnership—that is to say, if he has really found moneys to be brought in as capital or to pay off a partnership debt—then he is to be treated, as between him and the partnership, as a creditor, and must be paid as any other creditor must be paid before the Court can order payment of the costs, or in effect distribute the partnership assets between the partners. The case of *Rosher* v. *Crannis*, before Mr. Justice *Chitty*, shews that the Court ought not to be dainty in considering whether a sum due to a partner is strictly a debt or not; but that so long as the partner has provided money for the partnership he is to be considered in the position of a creditor. That is

(1) 6th Ed. 520, 600.
(2) 11 Ch. D. 942.
(3) 11 Ch. D. 942, n.
(4) 13 Ch. D. 845.
(5) 63 L. T. (N.S.) 272.

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entirely in harmony with the cases before Sir *George Jessel* and the Vice-Chancellor *Hall*.

But here there is a little variation upon that state of things. What has occurred here, as appears by the account to which I have been referred, is this. The partners were each of them bound to bring into the partnership £1750, and that they did. Each of them fulfilled that obligation; so that I am not here considering any question which might arise if the claim was by the partnership against any one partner to make him bring in capital which he had agreed to contribute, and had not contributed. Whether that would be a different case or not I do not pause to inquire, because it is not the case with which I have to deal. Each of these partners brought in his agreed capital, and, having done that, each drew out money from time to time. I have looked through the account, and apparently some of the moneys debited in each case to the partner do not come strictly under the title of drawings; for I see that in one case goods were supplied to the Defendant, and in another case money was paid to a creditor of his or to his account. But it is in substance the same thing as drawing. In each case something is drawn out by the partner which has to be set against the capital which he brought in. The Plaintiff drew out so little that there is due to him a balance of £1405, after crediting him with interest on capital, which has been taken into account. The Defendant, on the other hand, drew out so much that the balance due to him is only £804, and his position is that for the difference between these two sums there will obviously result a liability of the Defendant to the Plaintiff on the settlement of the accounts. The Defendant says that that must be disregarded in considering how the costs of the action are to be paid. He says that after the £649 due to the Plaintiff has been paid the costs must next be paid, and then this account between the partners must be settled afterwards. That contention seems to me to be inconsistent with the *Partnership Act*, 1890, with what the Lord Justice *Lindley* says in his work on Partnership (1), and with the decided cases. Mr. *Dickinson* says you must look back behind the certificate, and see on what account the certificate is based. The answer

(1) 6th Ed. p. 520.

to that is that the account was precisely the same in *Austin* v. *Jackson* (1) as the account in this case, viz., the ordinary account of partnership dealings and transactions between plaintiff and defendant. Therefore, the balance due from the partnership to either partner is really the amount shewn or ascertained on taking the partnership accounts between the partners. Then Mr. *Dickinson* says that the balance due to the partner is not in the same position as a debt. In one sense it is not. No money has passed between the partners, and the one partner is not claiming in respect of any particular sum of money advanced, but there is a debt in the way which I have already pointed out. The one partner having drawn out more than the other, the rights of the partners cannot be adjusted otherwise than by requiring the man who has drawn out too much to bring in something to make the positions equal; and if the costs are paid in the first instance, that is to say, before adjusting the rights between the partners, the inevitable result, as it seems to me, is that some costs are paid out of that which is due from the Defendant to the Plaintiff, that is to say, out of what ought to come to the Plaintiff by reason of the Defendant's contribution being larger than that of the Plaintiff. The principle seems to be that before you ascertain partnership assets for this purpose, that is to say, out of what the costs are to be paid, you must adjust the rights between the partners. It is only out of that clear amount which remains, and which will have to be divided between them according to their interests in the partnership, that costs are to be paid, and the administration principle is that the costs are taken out of the whole mass without any reference to the proportions in which the several persons interested are entitled to share in the mass; but you only apply the principle when you have ascertained the amount of the mass to which they are entitled. You must ascertain that first. In this case that can only be done by adjusting the rights of the partners; and then come the costs. I think the principle pointed out by Mr. *Dunham*, subject to the variation which I suggested, is right. You have the sum of £1370 realized assets, including a balance due from the receiver; you must apply that first in payment of

(1) 11 Ch. D. 942, n.

C. A. 1894 ROSS v. WHITE. Kekewich, J.

the debt due to the Plaintiff. That reduces it to a small sum. You must then adjust the rights between the partners, and it is quite possible that there will be something over for payment of the costs. That must be applied in payment of the costs of both parties. But it will not be enough; and then the principle of *Austin* v. *Jackson* (1) and the other cases must be applied as to the ultimate balance. The costs must be taxed and divided into two equal parts: one moiety must be paid by the Plaintiff and the other by the Defendant. That is to say, in the end they must pay the costs in proportion to their interests in the partnership—that is, on an equality.

C. C. M. D.

The order as drawn up was as follows:—

It is ordered that the funds in Court at the date of this order be dealt with as directed in the schedule hereto; the sum of £649 2*s.* 4*d.* therein mentioned, being the amount of the debt by the Chief Clerk's certificate dated the 26th of February, 1894, certified to be due to the Plaintiff, and the sum of £600 7*s.* 7*d.* in the said schedule also mentioned, being the difference between £1405 2*s.* 11*d.* by the said certificate certified to be due to the Plaintiff, and £804 15*s.* 4*d.* thereby certified to be due to the Defendant, from the partnership. Tax the costs of the Plaintiff and Defendant in this action. And it appearing that the residue of the said funds in Court and interest in the schedule mentioned, after making the payments thereby directed to be made to the Plaintiff, will be insufficient for the payment in full of the said costs, it is ordered that the said residue and interest be apportioned by the Taxing Master rateably between the Plaintiff and Defendant in proportion to the respective amounts of their said costs when taxed. And the Court being of opinion that the aggregate amount of the balance of such costs left unsatisfied after the payment directed by the said schedule ought to be borne by the Plaintiff and Defendant equally, doth order that the Taxing Master certify what sum is due from either of the parties to the other in respect thereof. And it is ordered that such sum be paid by the party from whom the same shall be certified to be due within seven days after the date of such certificate. Liberty to apply.

The schedule directed £649 2*s.* 4*d.* and interest at 5 per cent. on part thereof from the 26th of February, 1894, to be paid to the Plaintiff; and also £600 7*s.* 7*d.* to be paid to the Plaintiff; and that the amount to be apportioned in respect of the taxed costs of the Plaintiff and Defendant should be paid.

C. A. From this decision the Defendant appealed. The appeal came on to be heard on the 12th of July, 1894.

(1) 11 Ch. D. 942, n.

Renshaw, Q.C., and *S. Dickinson*, for the Appellant, referred to *Lindley* on Partnership (1), *Binney* v. *Mutrie* (2), and *Butcher* v. *Pooler* (3).

Warmington, Q.C., and *Dunham*, for the Plaintiff, cited *Austin* v. *Jackson* (4); *Hamer* v. *Giles* (5); *Potter* v. *Jackson* (6).

Renshaw, in reply.

LORD HERSCHELL, L.C.:—

In this case, upon a dissolution of partnership the accounts were taken under an order of the Court. As the result of those accounts, it appears that there is a sum of £649 due from the Defendant to the Plaintiff, that being a sum of money advanced by the one partner to the partnership which, it is admitted, must be treated as a debt: about that there is no dispute. Then the finding is that each partner had originally contributed an equal sum—£1750; each partner had drawn out some part of the capital which he had contributed, and the Defendant had drawn out a sum of £601 in excess of the sum drawn out by the Plaintiff.

The sole question which arises now is with reference to the payment of the costs of the Plaintiff and Defendant in taking these accounts. Mr. *Renshaw* contends for the principle that the payment of these costs ought to be made out of the assets after the discharge of any debts due, and before any distribution between the partners. It appears to me that that general proposition is well supported. But how is the matter to be dealt with in a case like the present, where the fund in Court, after the Plaintiff has received from it the £649 and the £600, is not sufficient to pay the costs? Mr. *Renshaw* contends that the costs ought to be paid out of the fund before the Plaintiff is allowed to take from those assets the £601. I cannot think that this view is correct. The effect of the transaction is this, that out of the assets of the partnership the Defendant has really received £601

(1) 6th Ed. p. 600.
(2) 12 App. Cas. 160.
(3) 24 Ch. D. 273.
(4) 11 Ch. D. 942, n.
(5) Ibid. 942.
(6) 13 Ch. D. 845.

C. A. 1894 ROSS v. WHITE. Lord Herschell, L.C.

in excess of what the Plaintiff has received, and he claims that he shall take his costs out of the fund in Court without making good to the assets of the partnership that which he has taken out in excess of the sum taken out by the Plaintiff. I think he cannot do so. Before he can claim to take his costs out of the assets, he would have to make good to the assets the sum which is found due from him. He has, in truth, in hand assets of the partnership, or what are to be considered as assets in adjusting the accounts between Plaintiff and Defendant, and out of those, no doubt, he can pay the costs; but he cannot, retaining those assets, and without bringing himself as regards the assets of the partnership on an equality with his partner, claim to take his costs out of the assets which are in Court for the purpose of answering the claims against the partnership.

For these reasons, I think the judgment appealed from is right, and that the appeal should be dismissed with costs.

LINDLEY, L.J.:—

I am of the same opinion. I was struck yesterday with what Mr. *Renshaw* said about the way in which the costs ought to be paid. I thought he was right, and I still think he was right provided the assets are as they ought to be. If his client will restore to the assets the sum in his hands, then his argument will be quite right. The answer to his case is, that before he can take his costs out of the assets, he must make good what is due to the assets; otherwise obvious injustice will be done.

I think, therefore, that the judgment of the Court below is right, and that the appeal must be dismissed with costs.

DAVEY, L.J.:—

I agree that the judgment appealed against is right in substance, and that the appeal should be dismissed. I think Mr. *Renshaw's* argument is right, that, before you pay the debts of the partners *inter se*, you must take into account the costs incurred in taking the accounts and winding up the affairs of the partnership; but the fallacy in the argument is this, that it leaves out of sight the fact that the sum which was overdrawn

by the Defendant and taken out of the partnership is really and truly part of the partnership assets, and it is the application of his principle which I think is wrong in his argument. The principle can only be applied subject to this, that the Defendant cannot take his costs until in fact or in account he has made good his obligations to the assets of the partnership—in other words, he has in his hand what is really and truly a part of the assets of the partnership, and although it is quite true that he is entitled to his costs in the first instance, the Plaintiff has a right to say to him, "Pay your own costs out of that portion of the assets which you have drawn out in excess of my drawings which you have in your hands."

I think the form of the order rather obscures the point. I should have thought the right form of order (although it comes to exactly the same thing in substance) would have been, "To pay the Plaintiff's costs out of the fund in Court; to let the Defendant deduct his costs out of the £600 which he owed to the assets; pay the balance into Court, and then divide between them the balance that then remained in Court." But it comes to exactly the same thing, and I think the order is right in substance, and that the appeal should be dismissed.

Solicitors: *G. Reader & Co.*, agents for *D. Johnstone, Bristol*; *Meredith, Roberts, & Mills*, agents for *Sibly & Dickinson, Bristol.*

M. W.

C. A.
1894
July 18.

CADOGAN *v.* LYRIC THEATRE, LIMITED.

[1894 C. 1786.]

Judgment Debtor—Equitable Execution—Appointment of Receiver—Delivery of Possession—Earnings of Theatre—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.

A judgment for debt was recovered against a theatre company. The theatre was subject to a mortgage. The company had no land except the theatre, of which they were lessees and were in occupation, and they were using it for the ordinary purposes of a theatre:—

Held (reversing a decision of *Kekewich*, J.), that a receiver could not be appointed at the instance of the judgment creditor to receive by way of equitable execution the moneys paid by the public for entrance to the theatre:

But *held*, that a receiver ought to be appointed of the rents and profits of the company's lands by way of equitable execution, without prejudice to the rights of any prior incumbrancers, and that the company should be ordered to deliver up possession of the lands to him.

APPEAL by the Defendant company against an order of Mr. Justice *Kekewich* on the 12th of July, 1894, appointing a receiver.

The Plaintiff was a judgment creditor of the company for £2000. The company were lessees of a theatre, at which they carried on the business of theatrical proprietors. They had mortgaged the lease. The Plaintiff, being unable to obtain satisfaction of his judgment, applied to Mr. Justice *Kekewich* for the appointment of a receiver by way of equitable execution of the rents due or becoming due and the profits earned by the company. There was evidence that the company had no rents to receive. The learned Judge was of opinion that money paid by the public at the entrance of a theatre for a license to enter the theatre, and to remain there for a time in order to witness the performances, was in the nature of rent of the theatre. And his Lordship made an order appointing a receiver of the rents and profits of the company by way of equitable execution.

The company appealed.

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Ingpen, for the company:—

There is no jurisdiction to appoint a receiver by way of equitable execution except in a case in which there is property of the debtor which could be taken in execution at law if his interest in it were legal instead of equitable. The money paid at the entrance of a theatre, like the profits or earnings of any other business, cannot be taken in execution at law, and, therefore, a receiver of it cannot be appointed: *Holmes* v. *Millage* (1).

[DAVEY, L.J., referred to *Harris* v. *Beauchamp Brothers* (2).]

The Court will not appoint a receiver of rents when there are no rents to receive. Nor would it be "just and convenient," within the meaning of sect. 25, sub-sect. 8, of the *Judicature Act*, 1873, to appoint a receiver, for the receiver would have no power to manage the theatre, and the result would be that it must be shut up: *Whitley* v. *Challis* (3); Rules of the Supreme Court, Order L., r. 15A.

Grosvenor Woods, Q.C., and *Cecil Chapman*, for the Plaintiff:—

Equitable execution is not in fact execution, but equitable relief which is granted because there is no remedy by execution at law: *In re Shephard* (4). Here legal execution cannot be levied on chattels which are in mortgage, and for that reason a Court of Equity will appoint a receiver. At any rate, a receiver should be appointed of the company's equitable interest in their property. No doubt the learned Judge intended the words "rents and profits" in the order to include earnings of the theatre. But *Holmes* v. *Millage* is distinguishable. In that case the "earnings" of which it was asked that a receiver might be appointed were the personal earnings of an individual; here the "earnings" in question are those of the business of the company.

The payments made by the public for the license to enter the theatre are of the nature of rent; they might even be taken under an *elegit* at law but for the mortgage. They resemble payments made for entrance to a race-course. The receipts of a

(1) [1893] 1 Q. B. 551.
(2) [1894] 1 Q. B. 801.
(3) [1892] 1 Ch. 64.
(4) 43 Ch. D. 131, 135.

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theatre are incident to the proprietorship of the theatre. The sheriff might be able to seize them under a *fi. fa.* from time to time, but he could not remain on the premises as a receiver would. But for the mortgage the theatre could be taken under an *elegit*.

[LORD HERSCHELL, L.C.:—The appointment of a receiver would not entitle him to receive the money taken at the doors; but he would have a right to stop the performances unless an occupation rent was paid to him. This would be a great benefit to the Plaintiff.]

Ingpen, in reply:—

It would not be "just and convenient" to appoint a receiver. The Court will not appoint a receiver when there is nothing to receive merely in order to put pressure on the company to pay the debt.

[LORD HERSCHELL, L.C.:—There is the property subject to the mortgage. In *Kerr* on Receivers (1) it is said: "If there are prior or outstanding mortgages, but the mortgagees are not in possession, or refuse to take possession, the Court will appoint a receiver of the mortgaged premises at the suit of judgment creditors without prejudice, however, to the right of mortgagees to take possession, if they think fit." *Rhodes* v. *Lord Mostyn* (2) is the authority cited for this proposition; and since the *Judicature Act* it has been held that it is not necessary for a judgment creditor to sue out an *elegit* before he applies for the appointment of a receiver: *Ex parte Evans* (3); *In re Pope* (4).]

A receiver as such has no charge on the property of which he is in possession.

The Plaintiff has another remedy by applying for a winding-up order.

[*Grosvenor Woods*, Q.C., referred to *Salt* v. *Cooper* (5).]

[DAVEY, L.J., referred to *Hatton* v. *Haywood* (6).]

The result of appointing a receiver in this case will be, that when any judgment debtor is carrying on a business, the business

(1) 3rd Ed. p. 45.
(2) 17 Jur. 1007.
(3) 13 Ch. D. 252, 260.
(4) 17 Q. B. D. 743, 749.
(5) 16 Ch. D. 544.
(6) Law Rep. 9 Ch. 229.

may be stopped by the appointment of a receiver. Special circumstances ought to be shewn: *Harris* v. *Beauchamp Brothers* (1).

At any rate, the order actually made was wrong.

LORD HERSCHELL, L.C.:—

The Plaintiff being a judgment creditor of the Defendant company for £2000, and being unable to obtain satisfaction of his judgment by means of execution, applied to Mr. Justice *Kekewich* for the appointment of a receiver, and obtained an order appointing a receiver of the rents and profits of the company by way of equitable execution. The view of the learned Judge was that, as the company was carrying on business at the theatre, the Plaintiff was entitled to have a receiver appointed to take the money paid by the public at the doors of the theatre, and in that way to obtain satisfaction of his judgment. With all deference to the learned Judge, I do not think this was a right order to make. An execution creditor can only come to a Court of Equity to enforce his judgment against property which is not capable of being reached at law. He is entitled to come to a Court of Equity to enforce his judgment when the debtor has some equitable interest which is not capable of being reached by execution at law, but which can be reached in equity. It was argued by Mr. *Grosvenor Woods* that money paid at the doors by persons who entered the theatre for witnessing the spectacle therein was really "rent" of the theatre—that is, of the company's land—and that, therefore, the order was a proper one, the case being on that ground distinguishable from *Holmes* v. *Millage* (2) and *Harris* v. *Beauchamp Brothers*. I do not think that that distinction will hold good. Money paid for entrance to a theatre is not properly described as rent or profits of the premises. No doubt premises are required for carrying on the business of a spectacle giver, but only just as they are required for carrying on any other business. In my opinion the distinction suggested between the present case and those two cases cannot be supported. But I think that the Plaintiff has rightly come to this Court for relief. If the theatre had not been mortgaged, the Plaintiff could have taken it under an *elegit* at law. But the remedy by

(1) [1894] 1 Q. B. 801. (2) [1893] 1 Q. B. 551.

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elegit is excluded by reason of the mortgage, the debtors having thus only an equitable interest in the theatre, having parted with the legal estate. But they have retained their equitable interest, and the words of Lord Justice *Lindley* in *Holmes* v. *Millage* (1) seem to me exactly to apply. He said: "The only cases of this kind in which Courts of Equity ever interfered were cases in which the judgment debtor had an equitable interest in property which could have been reached at law, if he had had the legal interest in it, instead of an equitable interest only." That applies here. There can be no doubt that, if the interest of the judgment debtors had not been merely equitable, the judgment creditor could have taken it under an *elegit*, and, as the interest is equitable, the creditor is, in my opinion, entitled to that equitable remedy which is a substitute for an *elegit* at law. It is not necessary to refer to more than one case—*Ex parte Evans* (2)—for in that case (3) Lord Justice *James* thus stated the principle of the previous decisions: "Beyond all question it was held in *Hatton* v. *Haywood* (4) and *Anglo-Italian Bank* v. *Davies* (5), that an order appointing a receiver amounted to equitable execution. A judgment creditor, not being able to obtain relief at law under the old system, because his debtor had nothing but an equitable interest in the land, came into a Court of Equity to obtain that relief which he could not obtain at law, and the moment he established the difficulty in his way at law, and the Court made the order giving the right to the possession of the land to the receiver appointed on his behalf, that order giving the right to possession to the creditor through the receiver was as much a delivery in execution of land in which the debtor had only an equitable interest, as was the sheriff's return to the writ of *elegit* at law, that he had extended the land, a delivery in execution of land in which the debtor had a legal interest."

That, I think, points clearly to the proper remedy of the creditor in the present case. The judgment debtors having only an equitable interest, the creditor ought to have precisely the

(1) [1893] 1 Q. B. 555.
(2) 13 Ch. D. 252.
(3) 13 Ch. D. 257.
(4) Law Rep. 9 Ch. 229.
(5) 9 Ch. D. 275.

same remedy in equity as he would have had at law, if the debtors' interest had been legal. The order should therefore be for the appointment of a receiver of the rents and profits of the company's land, and the company must deliver possession to him, but without prejudice to the rights of prior incumbrancers. In my opinion the Appellants were justified in coming to this Court, and therefore there will be no costs of the appeal.

LINDLEY, L.J.:—

I think that in substance the order appealed from is right and is in conformity with the principle which has governed Courts of Equity for many years. But I think that in form the order is open to objection. If there had been no mortgage, the judgment creditor would have had a legal right to issue an *elegit*, and under it to take possession of the company's land (including the theatre), and to make what he could of it. That would have been the Plaintiff's legal right, if the company's land had not been mortgaged. But the company have only an equitable interest in the theatre, and long before the *Judicature Act* the Court of Chancery was in the habit of appointing in such a case a receiver of the debtor's equitable interest. In *Rhodes* v. *Lord Mostyn* (1), in 1853, an order such as the Lord Chancellor has indicated was made. Why should not the same order be made in the present case? I see no reason why it should not. The order is entirely different from that asked for in *Holmes* v. *Millage* (2) and *Harris* v. *Beauchamp Brothers* (3). To remove all doubt, I think the company should be ordered to deliver up possession of the theatre to the receiver, subject to the rights of the prior incumbrancers. The order will no doubt be worked out in practice by the receiver fixing an occupation rent to be paid by the company.

DAVEY, L.J.:—

I agree that the order of Mr. Justice *Kekewich* was wrong in form, and I think it was also wrong in substance. Under it the receiver would have power to take the earnings of the theatre,

(1) 17 Jur. 1007. (2) [1893] 1 Q. B. 551.
(3) [1894] 1 Q. B. 801.

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and the learned Judge intended that the receiver should sit in the pay-box and take the money paid by the persons who entered the theatre. I do not think that a receiver appointed at the instance of a judgment creditor is entitled to carry on the business of the debtor, or to take the profits derived from it, though he may be entitled to prevent the debtor or any one else from carrying on business on the debtor's premises. That we ought to make an order such as has been indicated by the Lord Chancellor is, I think, perfectly plain. Ever since *Neate* v. *Duke of Marlborough* (1) it has been held that when, by reason of a judgment debtor having only an equitable interest, there is a legal impediment to the creditor's remedy by *elegit* at law, he is entitled to come to a Court of Equity, which will give him precisely the same remedy in equity as he would have obtained at law if the debtor's interest had been legal instead of equitable. This seems to me clearly established, not only by *Neate* v. *Duke of Marlborough*, but also by *Hatton* v. *Haywood* (2), *Anglo-Italian Bank* v. *Davies* (3), and *In re Pope* (4). The vice of the order appealed from is, that it gives the receiver power to take the profits of the company's business, and, apparently, wherever it may be carried on. I think we ought to make an order in the terms which the Lord Chancellor has mentioned, limited to rents and profits derived from the company's land. And as it appears that the whole of the land is in possession of the company, I think that, to avoid any question, it would be right to direct the company to deliver up possession to the receiver, without prejudice to the rights of prior incumbrancers.

MINUTE OF ORDER.—Order of the 12th of July, 1894, to be varied so far as it directs that a receiver be appointed to receive the rents and profits of the Defendant company by way of equitable execution, and instead thereof order that a proper person be appointed to receive the rents and profits of the lands of the Defendant company by way of equitable execution, without prejudice to the rights of any prior incumbrancers. And order the Defendants to deliver up possession of the lands to the receiver.

Solicitors: *M. S. Rubinstein; Lee & Pembertons.*

(1) 3 My. & Cr. 407.
(2) Law Rep. 9 Ch. 229.
(3) 9 Ch. D. 275.
(4) 17 Q. B. D. 743.

W. L. C.

NEVILLE *v.* MATTHEWMAN.

C. A. 1894. July 25.

[1894 N. 756.]

Practice—Order for Payment into Court on Motion—Admission by Defendant —Admissions in Letters before Action.

In an action to compel the Defendant to make good an alleged breach of trust, the Plaintiffs moved for an order that the Defendant should pay into Court £1000, on the ground that he had by letters written before action admitted that that sum was in his hands on behalf of the Plaintiffs:—

Held, that, even if the letters taken alone amounted (which the Court, differing from *Chitty*, J., thought they did not) to an admission that the £1000 was in the Defendant's hands, the Court ought to have regard to an affidavit made by him in answer to the motion; and that, looking at the statements contained in that affidavit, an order for payment into Court ought not to be made.

The practice of ordering payment of money into Court by a Defendant upon interlocutory motion, on the ground of admissions made by him, ought not to be extended any further than it was extended by *Jessel*, M.R., in *Freeman* v. *Cox* (1).

Decision of *Chitty*, J., reversed.

APPEAL by the Defendant, *J. B. Matthewman*, against an order of Mr. Justice *Chitty*, made on the 12th of July, 1894, that he should on or before the 6th of August, 1894, lodge in Court the sum of £1000 to the credit of the action.

William Matthewman, deceased, the father of the Plaintiff Mrs. *Neville*, and of the Defendant, by his will, dated the 16th of October, 1872, gave to his wife during her widowhood the annual sum of £52, to be paid to her by weekly or such other instalments as his executors should think fit (not exceeding three months without the written consent of his wife). And the testator gave to his brother *John Matthewman* and to his son the Defendant, the sum of £1000, upon trust to invest the same upon Government, real or leasehold securities, or upon the bonds, debentures, or debenture stock of any railway company or municipal body, with power to vary any such securities, and to stand possessed of the income thereof upon trust, during the minority of his daughter *Beatrice Mary* (afterwards Mrs. *Neville*), to pay to

(1) 8 Ch. D. 148.

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his wife such income, by weekly or other instalments as aforesaid, for the maintenance, education, and benefit of his daughter; but on her marrying or attaining twenty-one, then to pay the entire income resulting from the £1000 to her during her life, for her separate use, and after her decease upon certain trusts for the benefit of her children. But, if his daughter should die during minority and unmarried, and in the event of her dying without leaving any child her surviving, then the said principal sum was to fall into and form part of his residuary estate. And he devised and bequeathed all his residuary real and personal estate to his two sons, the Defendant and *W. W. Matthewman*, in equal shares. And the testator directed his son the Defendant, during the minority of his son *W. W. Matthewman*, to carry on his business of a dyer for their joint benefit. And the testator also declared that his brother and executor *John Matthewman* should be exonerated from all responsibility from seeing after the said business and from all losses (if any) arising thereto during such minority. And the testator appointed his said brother and the Defendant executors of his will.

The testator died on the 14th of November, 1872. His daughter survived him; and on the 24th of August, 1878, she married *James Neville*. There had been three children of the marriage, one of whom had died in infancy, and the other two were (by a next friend) co-Plaintiffs with their mother in this action.

John Matthewman died on the 25th of September, 1892. The testator's widow died on the 25th of April, 1893. After the testator's death the Defendant continued to carry on his business, until the younger son attained twenty-one on the 26th of February, 1877, for the benefit of the two jointly. On the 27th of February, 1877, the younger son retired from the business, and he thereupon sold to the Defendant his share and interest in the business, and in the residuary estate of the testator, and he died before this action was commenced.

The Defendant paid to the testator's widow during her life the annuity bequeathed to her by the will, and he also paid to his sister, Mrs. *Neville*, the sum of £50 annually down to August, 1893, when he reduced the payment to £40 a year.

In March 1894, Mrs. *Neville* consulted Messrs. *Ferns & Sons*, solicitors, and the following correspondence then took place:—

Ferns & Sons to the Defendant.

"3 March, 1894.

"*William Matthewman, deceased.*

"We have been consulted by Mrs. *Neville* as to her life interest in the sum of £1000 directed to be invested under the testator's will, and are instructed to apply to you for immediate payment of the arrears of income now due to her, and to inform you that, unless the amount, together with 6*s.* 8*d.* our charges, be remitted to us, we have instructions to take such steps to recover the same as may be deemed advisable."

Memorandum.

The Defendant to Mrs. *Neville*.

"10 March, 1894.

"Enclosed please find cheque for balance due as per particulars herewith.

	£	*s.*	*d.*
"Interest	10	0	0
Less your share of funeral expenses .	7	15	10
	2	4	2

Kindly own receipt and oblige."

Ferns & Sons to the Defendant.

"12 March, 1894.

"*Re Matthewman, deceased.*

"Mrs. *Neville* has handed us your letter of 10th inst., inclosing cheque for £2 4*s.* 2*d.*, which she declines to accept, and which we now return.

"She denies any liability whatever in respect of funeral expenses, claimed to be deducted by you from her income payable to her herein, and objects to the amount of such income being reduced from £50 to £40 per annum without information, to which she certainly is entitled before such course be adopted by you.

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"We have therefore to request at once particulars as to how and in what form of security the £1000 directed to be invested under the testator's will is invested on her behalf, and for payment of £15 15*s.*, amount now due to her, and, unless we receive cheque for that amount, and the particulars asked for, we have instructions to institute proceedings against you without further delay."

Memorandum.

The Defendant to *Ferns & Sons.*

"14 March, 1894.

"*Re the late Mr. Matthewman.*

"I am surprised at the contents of yours of 12th inst. With regard to reduced interest, your client had notice and agreed, and has been paid at the reduced rate without any objection being made. As to the funeral expenses, it was her own suggestion, and she has since agreed by letter. The investment is just where the testator left it."

Ferns & Sons to Defendant.

"15 March, 1894.

"*Re Matthewman, deceased.*

"Unless you comply with the request in our letter of 12th inst. we shall proceed. Your letter received this morning is simply an evasive reply to ours."

Memorandum.

The Defendant to *Ferns & Sons.*

"17 March, 1894.

"In reply to yours of 15th inst., I have given you a full answer. The money is invested in above business, and has never been out. I have nothing to evade."

Ferns & Sons to Defendant.

"22 March, 1894.

"*Re Wm. Matthewman, deceased.*

"We are in receipt of your letter of 17th, which is not satisfactory to our client. We are, therefore, instructed to request

that the terms of the testator's will with regard to the £1000 in favour of Mrs. *Neville* be carried out, and that such investment be made to her satisfaction. Unless we receive your reply that such course will be at once adopted, we shall take such proceedings in the interests of our client as may be deemed advisable, of which please accept this letter as notice."

Memorandum.

The Defendant to Mrs. *Neville.*

"23 May, 1894.

"I have received a writ issued by you from High Court of Chancery. If this action is not stopped at once it will ruin me, and lose all your money. It will be better if you see me on or before Saturday. Name place and time.

"Your reply by return decides the matter."

The writ was issued on the 21st of May, 1894. By the indorsement thereon the Plaintiffs claimed a declaration that the Defendant had been guilty of a breach of trust in retaining or investing in the business the £1000 bequeathed by the testator on trust for Mrs. *Neville* and her children, and that the Defendant was bound to make good the £1000, together with all profits made by the employment thereof in the business, or with interest thereon at the rate of 5 per cent. per annum; an account of the profits made by the employment of the £1000 in the business, and an inquiry whether it was for the benefit of Mrs. *Neville* and her children to elect to take interest or profits; that in the meantime the Defendant might be ordered to pay the £1000 into Court; that new trustees of the will might be appointed so far as related to the trusts of the £1000; and that the Defendant might be ordered to pay the costs of the action.

The Plaintiffs moved for an order that the Defendant should pay the £1000 into Court. In answer to the motion the Defendant made an affidavit, in which he said that the testator had no real estate; that the value of his estate at the time of his death was sworn at £2934 2*s.* 4*d.*, after deducting from the value of the leasehold premises at which he carried on his business a mortgage-

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debt of £1000. The testator's debts (including the £1000 mortgage debt) amounted to £2482 3*s.* 1*d.*, which the Defendant had either paid, or had rendered himself personally liable for the discharge thereof. He had also paid for funeral expenses, probate duty, and other executorship expenses, sums amounting to £204 13*s.* 2*d.* He said that he had been advised that, by reason of the bequest and directions contained in the will with reference to the testator's business, the testator's assets comprised in the business were not liable to be applied or appropriated towards raising the £1000 bequeathed in trust for Mrs. *Neville* and her children, but that the assets comprised in the business were a specific bequest by the testator to the Defendant and his late brother *W. W. Matthewman.* If this were so, the Defendant said that there remained no balance whatever, and there never had been any estate of the testator liable to be applied towards the raising of the sum of £1000 in question in the action. The affidavit shewed that, in any event, the net value of the testator's estate was either less than, or did not much exceed, £1000.

The Defendant's affidavit contained the following paragraph:—

"Notwithstanding that the testator left no estate applicable to the payment of the widow's annuity and the said sum of £1000, I have at all times, down to the commencement of the proceedings in this action, been desirous of making provision for my mother and sister in accordance with the desire expressed by my father in his will. From the time of the testator's death down to the time of my mother's death I regularly paid her out of my own moneys an annuity of equal amount to that bequeathed to her by my father, which payments amount together to £1060 or thereabouts. From the time of the testator's death down to August, 1893, I regularly paid to my sister, Mrs. *Neville*, a sum of £50 a year, with a view of myself making to her a provision equivalent to that which my father had intended for her; and since August, 1893, until November, 1893, I have, with the same object in view, paid to her a sum after the rate of £40 a year. I made that reduction in the amount which I paid to her because I was of opinion that, if the sum of £1000 intended by my father for her benefit had in fact existed, it would not have produced

a larger income than £40 a year. By the payments in this paragraph referred to, I estimate that I have paid to my sister since the testator's death the sum of £1047 10*s.* or thereabouts."

This affidavit was not answered by the Plaintiffs.

Mr. Justice *Chitty* held that the Defendant's letters amounted to an admission that he had in his hands the £1000 bequeathed by the testator on trust for Mrs. *Neville* and her children, and he ordered the Defendant to pay that sum into Court.

The Defendant appealed.

Swinfen Eady, Q.C., and *Alexander Young*, for the Defendant:—

The letters rightly construed do not amount to an admission that the Defendant has the £1000 in his hands. On the contrary, it is clear that he has never had it in his hands; it has always remained in the business, where it was at the death of the testator. Even if by so leaving it the Defendant has committed a breach of trust, this is not a ground for ordering him to pay the money into Court upon an interlocutory motion. This order goes further than any previous order of the kind, and the practice ought not to be extended: *London Syndicate* v. *Lord* (1); *Freeman* v. *Cox* (2); *Hollis* v. *Burton* (3).

Farwell, Q.C., and *Abraham*, for the Plaintiffs:—

The letters amount to an admission that the Defendant has the £1000 in his hands, and the Court will act for the *interim* protection of the fund. The order is justified by the decision of this Court in *Porrett* v. *White* (4), in which *Freeman* v. *Cox* was approved.

LORD HERSCHELL, L.C. (after reading the will and the above letters, and stating the other facts, continued):—

The Defendant's letter of the 14th of March manifestly conveyed the meaning that Mrs. *Neville's* £1000 had never been invested according to the directions of the testator's will, but that it still was where the testator had left it—viz., in the

(1) 8 Ch. D. 84.
(2) Ibid. 148.
(3) [1892] 3 Ch. 226.
(4) 31 Ch. D. 52.

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business. Taking all the letters together, it is clear that the intention of the Defendant was to say that the testator's money had all been invested in his business, and that Mrs. *Neville's* £1000 was where the testator himself had put it. It is said that the letters amount to an admission that the Defendant had the £1000 in his hands. I should not be satisfied that the letters, if they stood alone, amounted to such an admission. But the Defendant has made an affidavit, which has not been answered by the Plaintiffs, and the Court must deal with the whole of the evidence when the case comes before it. This affidavit shews that the value of the net residue of the testator's estate at the most did not much exceed £1200, and this was obviously not sufficient to pay both the annuity to the widow and the legacy to the daughter in full. Even if the widow were not entitled to priority, there would not be enough to pay the daughter's £1000. But, during all the years which have elapsed since the testator's death, the Defendant, besides paying the annuity to the widow as long as she lived, has paid interest on the £1000 to his sister at the rate of 5 per cent. up to last year, and since then at the rate of 4 per cent. Looking at all these facts as a whole, it seems to me, with all respect to the learned Judge, that it would be nothing less than monstrous to treat the Defendant's letters as an unequivocal admission that he has in his hands a sum of £1000 belonging to his sister and her children. It is clear that he has not now, and never has had, such a sum in his hands on their behalf. The only difficulty has arisen from the generosity with which he has acted towards his mother and his sister, because he was anxious that they should not lose the provision which his father had intended to make for them. It is admitted that in old times an interlocutory order for the payment of money into Court by a defendant could have been made only upon an admission in his answer that he had the money in his hands. Then a further step was taken in relaxing this rule by treating an admission in an affidavit of the defendant as a sufficient admission for this purpose. Then the late Master of the Rolls, Sir *G. Jessel*, took a further step in relaxing the rule by ordering a defendant to pay money upon an affidavit of the plaintiff, which the defendant had not answered, that he had a

sum of money in his hands. Beyond that I am not inclined to go. In *Freeman* v. *Cox* (1) Sir *G. Jessel*, M.R., said: "The new Orders have no reference to such a case. I will therefore make a precedent. It seems to me that the principle on which the Court has ordered payment of money into Court has been that the defendant must admit that the money is in his hands for the purpose of the application. In *Jervis* v. *White* (2) Lord *Eldon* took the affidavit of the plaintiff charging the defendant with having a sum of money in his hands and an affidavit of the defendant before answer together as an admission, and ordered the money to be paid into Court. Here we have the affidavit of the plaintiff and the service of the notice of motion upon the defendant. This, I think, is a sufficient admission, the principle being to make the defendant pay into Court what he does not dispute to be owing from him." That appears to me to lay down a perfectly sound principle. But if, upon the whole of the facts before the Court, it is obvious that the defendant does in good faith dispute the title of the plaintiff, and that there is a serious question to be tried, it would be monstrous prematurely to order him to pay money into Court when the result of the trial may be to shew that there is nothing due from him at all, No doubt if a defendant has made a clear, unequivocal admission that he has a sum of money in his hands, he cannot afterwards get rid of it by merely saying that he disputes the plaintiff's claim; there must be a real *bonâ fide* dispute. There is clearly such a dispute here, and there is nothing to shew that the money is in any peril. With all deference to the learned Judge, I think that his order goes beyond any previous case of the kind, and that it cannot be maintained. The order must be discharged, with costs in both Courts.

LINDLEY, L.J.:—

Unless care is taken in making such orders a very dangerous precedent may be established. Such orders may easily become very oppressive. Under the old practice of the Court of Chancery such an order could only have been made upon an admission contained in the defendant's answer. We all know

(1) 8 Ch. D. 149. (2) 6 Ves. 738.

C. A. 1894 NEVILLE v. MATTHEWMAN. Lindley, L.J.

with what care answers were framed; and if by his answer the defendant admitted that he had in his hands money belonging to the plaintiff, there could be no danger in ordering him to pay it into Court. Now that the practice has been relaxed, and has been extended to admissions made by affidavits, much more care is required in making such orders. I do not think that the Defendant's letters will fairly bear the construction that the Defendant ever had the £1000 in his hands. To my mind they mean this, that the money was never invested by him at all, but that it remained where the testator himself had put it, in his business. At the very outside, I think the net balance of the testator's estate amounted to some £950, and the widow was entitled to an annuity of £1 a week. Look at the case in what way you will, I cannot extract from the Defendant's letters, fairly construed, an admission that he had ever had in his hands £1000 belonging to the Plaintiffs; and he ought not, on those letters, to be ordered to pay the £1000 into Court before the trial of the action.

DAVEY, L.J.:—

I agree that orders of this kind made upon interlocutory motions may be the instruments of great oppression, and indeed may produce great injustice. It was no doubt the duty of the Defendant to realize the testator's estate and to apportion it among the persons entitled under the will, and his default in not doing this may, when the facts are ascertained, expose him to some liability, but that is not a reason why he should be ordered to pay £1000 into Court now. If he had adopted the course which I have mentioned there would, I think, assuming the account given by his affidavit to be correct, have been at the most a sum of £600 for the Plaintiffs, and that sum invested upon a security yielding 3 per cent. would have produced only £18 a year. Instead of doing this he paid the widow's annuity so long as she lived, and he paid until last year £50 a year to his sister, hoping no doubt that the business would in time improve so as to enable him to pay both the annuity and the £1000 legacy in full. It is possible that by so doing he has admitted assets of the testator, or he may be able to give a sufficient

explanation. He may be right or he may be wrong in what he states as to the amount of the estate. But all these facts will have to be proved at the trial of the action, and I think it would under the circumstances be a perversion of justice to order him to pay the full sum of £1000 into Court now. As Lord Justice *Lindley* has said, the practice of the Court of Chancery orginally was to order a defendant to pay money into Court upon an interlocutory motion only when he had by his answer admitted that the sum was in his hands. An admission that the sum in question was due from him to the plaintiff was not sufficient; he must have admitted that it was actually in his hands. The practice was afterwards extended to admissions made by a defendant in affidavits, and a still further extension was made by Sir *G. Jessel*, M.R., in *Freeman* v. *Cox* (1). I am not disposed to carry the practice any further. In my opinion such orders ought to be made only when it is made out to the satisfaction of the Court that the defendant has the sum claimed in his hands, and that he has no real defence to the plaintiff's demand. Under the present practice there are expeditious modes of trying questions of liability, and there is less reason now than there was under the old practice for ordering money to be paid into Court before judgment.

Solicitors: *Ramsden, Radcliffe & Co.*, agents for *Ramsden, Sykes, & Ramsden, Huddersfield; Pitman & Sons*, agents for *Ferns & Sons, Leeds.*

(1) 8 Ch. D. 148.

W. L. C.

C. A.
1894
WRIGHT, J.
June 8.
C. A.
July 26, 27.

In re R. BOLTON AND COMPANY.

SALISBURY-JONES AND DALE'S CASE.

[0021 of 1894.]

Company—Director—Qualification Shares—Resignation during Period allowed for Qualification—Winding-up—Contributory.

By the articles of association of a company, (*a*) the signatories thereto were to be directors until such time as six of them should nominate another director in their place; (*b*) the qualification of a director was to be the holding £100 in shares, but he might act without acquiring his qualification; (*c*) a director was to acquire his qualification within three months from his appointment, and unless he should do so he was to be deemed to have agreed to take the shares from the company.

The six signatories, within three months of their appointment, signed a paper appointing a director in their place. Two of them never otherwise acted as directors, and never acquired their qualification shares:—

Held, by *Wright*, J., that, by accepting office and acting as directors, they had agreed to take the qualification shares, and that that agreement was not destroyed by their resignation within the three months:

Held, by the Court of Appeal, *Lindley*, L.J., dissenting, that directors who resigned within the three months were under no obligation to take the qualification shares from the company.

R. BOLTON AND COMPANY, LIMITED, was a company registered in April, 1893, under the *Companies Act*, 1893, with a nominal capital of £12,000 in ordinary and preference shares of £5 each.

The articles, which were dated the 21st of April, 1893, provided as follows:—

"89. The first managing director shall be *Reginald Bolton* . . . . The said *Reginald Bolton*, and the remaining six subscribers to these articles, shall be the first directors until such time as the latter or a majority of them shall nominate, by an instrument in writing under their hands, another director or directors to act with the said *Reginald Bolton* in place of the said remaining six subscribers."

"91. The qualification of a director, other than the managing director, shall be the holding of shares of the company of the nominal amount of £100 in ordinary or preference shares. A

director may act before acquiring his qualification, but shall in any case acquire the same within three months from his appointment, and unless he shall do so he shall be deemed to have agreed to take the said shares from the company, and the same shall be forthwith allotted to him accordingly."

"94. The office of a director shall be vacated . . . . (*b*) if by notice in writing to the company he resigns his office."

The signatories to the articles were *R. Bolton*, *A. T. Salisbury-Jones*, *F. W. Salisbury-Jones*, *J. J. Dale*, and three other persons.

On the 30th of May, 1893, *A. T. Salisbury-Jones*, acting as a director, signed some certificates of shares in the company; and on the 29th of June, 1893, *A. T. Salisbury-Jones*, *F. W. Salisbury-Jones*, and *J. J. Dale*, at a meeting of the directors, joined in signing a paper appointing another person a director in place of the signatories.

Save as aforesaid, none of the above-named three persons acted as a director, and none of them ever acquired his qualification shares.

On the 31st of January, 1894, the company was ordered to be wound up, and in the winding-up the Official Receiver and liquidator settled the names of *A. T. Salisbury-Jones*, *F. W. Salisbury-Jones*, and *J. J. Dale*, on the list of contributories in respect of the shares required to qualify them as directors, and they applied by summons to have their names struck off such list.

The summons was adjourned into Court, and heard by Mr. Justice *Wright* on the 8th of June, 1894.

Rufus Isaacs, in support of the summons:—

The articles in this case are different from those in *Hewitt's Case* and *Brett's Case* (1). But they are practically the same as those in *Isaacs' Case* (2) and *In re Hercynia Copper Company* (3). Those cases are, however, distinguishable, for in neither of them did the director, as in this case, resign before the expiration of the period allowed for acquiring his qualification shares.

(1) 25 Ch. D. 283. (2) [1892] 2 Ch. 158.
(3) W. N. (1894) 15; since reported [1894] 2 Ch. 403.

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In this case the directors were not bound to qualify till the last day of the period allowed for that purpose. Before that day arrived they had ceased to be directors, and there was then no necessity to qualify.

O. L. Clare, for the Official Receiver and Liquidator, was not called upon.

WRIGHT, J.:—

As I understand, in all the cases on this subject there has been an agreement to take shares, and if there has been such an agreement the person who has entered into it must be put on the register of shareholders.

In the present case the Applicants were signatories to the articles, which provided that they were to be directors until such time as they should, acting as such, nominate some one else to act in their place. One of them acted as a director on one occasion within three months of his appointment, and he and the other two Applicants on the 29th of June, 1893—also within the three months specified in article 91—at a meeting of directors signed a paper vacating their own office, and appointing another person to succeed them as director. If that was not done by them as directors, it was not validly done at all. After the Applicants had signed the articles, and the articles had been registered, if anything was wanting to shew that they had agreed to become directors, their acting on the 29th of June, 1893, by resigning and appointing another director, was sufficient evidence of their having agreed to act. Then does the fact of their having resigned within the three months make any difference? [His Lordship read article 91, and continued:—] I cannot read that as in any way discharging the agreement which was arrived at, either at the time of their signing the articles or at the time of their acting as directors. The object of the provision was to give them time to buy their shares in the public market or otherwise, instead of having them allotted to them by the company.

In *In re Hercynia Copper Company* (1) the precise question

(1) W. N. (1894) 15; since reported [1894] 2 Ch. 403.

did not arise, and it has not arisen in any other case; but I cannot see anything in principle which shews that the mere fact of the resignation of a director destroys the agreement to take shares which he has entered into by becoming and acting as a director. I must hold that the Applicants are liable in respect of their qualification shares, although they have resigned their office.

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The summons will be dismissed with costs.

F. E.

The Applicants appealed. The appeal was heard on the 26th and 27th of July, 1894.

C. A.

Rufus Isaacs, for the Appellants :—

The articles did not impose any obligation to take shares upon directors who resigned within three months from the date of their appointment. This case is distinguishable from *Isaacs' Case* (1) and *In re Hercynia Copper Company* (2), because in those cases the directors continued in office after the qualifying period. The final words of art. 91 were inserted merely for the purpose of obviating the difficulty caused by *In re Wheal Buller Consols* (3), where it was held that the acceptance of the office of director and the continuing to act after the qualifying period did not amount to a contract to take the qualification shares in the absence of any special provision to that effect in the articles.

O. L. Clare, for the Respondent :—

The effect of the article is to impose upon every person who accepts the office of director an absolute obligation to acquire shares from the company unless, within three months of his appointment, he acquires them elsewhere. That is an obligation which starts the moment a man becomes a director, and is an obligation from which he cannot escape. Every director by accepting office becomes under an obligation to qualify in one of two ways for the period during which he has been director, viz., by purchasing shares on the market or elsewhere, or by acquiring them from the company. The object of articles of

(1) [1892] 2 Ch. 158. (2) [1894] 2 Ch. 403.
(3) 38 Ch. D. 42.

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this kind is to secure that directors shall have a substantial stake in the company.

[LORD HERSCHELL, L.C.:—Suppose a director acquired his qualification shares and sold them the next day?]

I admit that if a director acquired his qualification shares and then sold them and then resigned, there would be a difficulty in putting him on the list of contributories in respect of his qualification shares.

Rufus Isaacs, in reply.

LORD HERSCHELL, L.C.:—

The question which we have to determine in this case turns upon the construction of the 91st of the articles of association of this company. It must be admitted that it is not possible in any point of view to put a thoroughly satisfactory construction upon it. Even if construed as Mr. *Clare* has contended it ought to be, it does not carry out effectively that which he says is its object, viz., to secure that the directors shall have a stake in the company. [His Lordship referred to arts. 89 and 91, and continued:—]

The question is whether the Appellants in this case can be deemed to have agreed to take shares from the company. It is admitted on the authorities that unless the last words of art. 91 are applicable, although they may have acted as directors not only for a period of three months but for a longer period, no agreement could be inferred on their part to take their qualification shares so as to entitle the liquidator to put them on the list of contributories in respect of them, and the sole question is whether events have happened to make the last words of the article applicable to the Appellants, and to justify the liquidator in putting them upon the list of contributories. It cannot be doubted that if the present Appellants had continued to act as directors for more than the three months they would be deemed to have agreed to take the shares from the company, and they would then have been properly put upon the list. That was *Isaacs' Case* (1), and I accept that decision. But the difficulty in

(1) [1892] 2 Ch. 158.

this case is that they did not continue in office beyond the three months, but ceased to be directors about two months after signing the articles. Are they nevertheless to be deemed to have agreed to take shares from the company? It must be borne in mind that the qualification of a director as stated in art. 91 is not the acquiring, but the holding of so many shares in the company. It is the duty of the directors, so long as they act as directors, not only to acquire, but to hold the qualifying shares, and unless they do so they cannot be said to be qualified directors. The article says in effect that a director must be the holder, *i.e.*, during the whole of the time he remains a director, of shares of a given amount. It appears to me that this article is designed to indicate that though a man to be a qualified director must hold a certain number of shares, he may postpone for three months acquiring the holding necessary to qualify him, and still have all the rights of a director. After that period he must acquire the shares, and must hold them so long as he is a director, otherwise he cannot be a qualified director. Then comes the question whether a person who becomes a director, but who, before the three months has expired, has ceased to be a director, is bound then to acquire the shares, or, if he does not, whether he must be deemed to have agreed to take them. The words are, "A director may act before acquiring his qualification, but shall in any case acquire the same within three months from his appointment, and unless he shall do so he shall be deemed to have agreed to take the said shares from the company." The primary obligation is that a director should acquire and hold so many shares as his qualification within three months from the date of his appointment, and it is only in case of his default in doing that that he is to be deemed to have agreed to take shares. Was it the intention of these words to require a person who had ceased to be a director within the three months to acquire his qualification? He could not acquire his qualification because he had ceased to be a director; he might acquire a certain number of shares. In my opinion, this is not a mere verbal distinction, because it is not the object of this article to place a certain number of shares, and, if Mr. *Clare's* contention is

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correct, the only effect would be that, although a man has ceased to be a director, and the purchase of shares could not qualify him, yet he must go into the market and buy shares, which he may immediately sell again, for, having ceased to be a director, he is no longer under any obligation to hold them. Can it, then, be contended that after he has ceased to be a director he shall go into the market and acquire the shares and so fulfil the words of the article, "acquire his qualification"? That is not the intention of the article. If this were an article that every person who became a director should necessarily acquire a certain number of shares, and should hold them for a certain time, I should be disposed to enforce it. I think it is a very good object that articles should secure that the directors should have a stake in the company, because I feel the difficulty of allowing persons to manage a company without having some stake in it, or of allowing them to have the power to part immediately with any such stake as they have. But the question is, Is that provided for by this article? I answer, No. That is not provided for even upon the construction suggested by Mr. *Clare*, because he admits that the obligation imposed by the article upon the Appellants would be satisfied by their acquiring the shares, and that they need not hold a single share. They might go into the market and acquire the shares and sell them again the next day, because it is only if a director fails to acquire his qualification within three months that he is deemed to have agreed to take the shares from the company. In my opinion, the obligation we are asked to declare as having existed is one which would not effect any advantage to the company, and does not seem to be within the intention of the parties. The learned Judge below asks whether the fact of the directors having resigned within the three months discharges them from the agreement which they have entered into. I agree that it would not. Where I differ from him is upon the question whether any agreement has been arrived at. I do not read this article as imposing any obligation to take shares on a person who, at the expiration of the three months, is no longer a director. I think that the appeal should be allowed.

LINDLEY, L.J.:—

In this case I have the misfortune to differ from the Lord Chancellor. I agree that the question turns upon the construction of the articles. The first question which occurs to me is as to the meaning in art. 91 of the expression "a director." I understand that expression as meaning any person who assents to become a director and who does become one. It is not necessary that he should hold the qualifying shares for any particular time, and he may become a director and retire the next day if he chooses. The qualification of a director is the holding of so many shares; but a director cannot hold shares unless he acquires them, and he must hold them so long as he is director. In other words, in order to qualify, a director must hold, *i.e.*, must acquire and hold, shares of the stipulated value; but any director may act before acquiring his qualification. Then come the words which, to my mind, are the most important in reference to the question we have to determine: "but shall in any case acquire the same within three months from his appointment, and unless he shall do so shall be deemed to have agreed to take the said shares from the company." "The said shares"—that is, the shares he has agreed to take in order to qualify. In my opinion, the object of the article was to prevent persons becoming directors who did not bind themselves to take shares. That seems to me to be the natural and not the forced meaning of the article. I think that the appeal ought to be dismissed.

DAVEY, L.J.:—

This case is exclusively one of construction of the articles. The earlier cases are only important as shewing, first, that in order to fix a director with liability in respect of his qualification shares you must find a contract by the director with the company to take the shares within the 23rd section of the *Companies Act*, 1862; secondly, that the articles of a company, though not themselves constituting the contract, are nevertheless evidence of the terms upon which a director has contracted to become a director. I agree that if the Appellants can be shewn to have entered into an absolute contract to take shares, they do not

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relieve themselves from the contract by resigning their position of directors. The question is, are the Appellants in that position? Their contract is that they will hold shares in the company to the extent of £100 so long as they remain or act as directors; but that primary obligation is subject to this—that, for a period of three months, they may act without acquiring or holding their qualification. The obligation to acquire shares is only ancillary to the obligation to hold them, which is the primary obligation, and is for the purpose only of enabling the directors to hold them. When the directors resign they cease to be under any obligation to hold. Of course, if they have already entered into a contract to take shares that will not relieve them. In this case there is no absolute contract to take shares from the company. The contract to take shares from the company only arises if the director has not, previously to the expiration of the three months, done something, *i.e.*, acquired his qualification *aliunde*. Looking at the purpose of this article, I think that the words "acquire his qualification" must be construed strictly, and that "qualification" means shares to be used as a qualification for enabling a director to act. The contract is that if a director fail to acquire his qualification *aliunde* he shall acquire it from the company. But if, on the expiration of the three months, he is no longer in a position which requires him to hold his qualifying shares, he is no longer under any obligation to acquire them. On these grounds I agree with the Lord Chancellor that this appeal ought to be allowed.

Solicitors for the Applicants: *Russell & Arnholz.*

Solicitors for the Official Receiver and Liquidator: *Firth & Co.*

H. C. J.

In re McHENRY. McDERMOTT *v.* BOYD.

LEVITA'S CLAIM.

C. A. 1894 July 27.

[1891 M. 1550.]

Bankruptcy—Annulment of Adjudication with consent of Creditors—Purchase of Debts of Creditors—Secret Agreement with one Creditor—Validity—Fraud on Bankrupt Law.

A bankrupt, desiring to obtain the annulment of his bankruptcy, induced some of his creditors to sell their debts to two trustees, who were provided with funds for the purpose, and who were as assignees of the debts to consent to the annulment. The trustees obtained assignments of the several debts on various terms, including an assignment of a debt of £25,000 in consideration of £2000 paid by them to the creditor. This assignment was made in pursuance of an agreement between the creditor and the bankrupt, whereby the bankrupt agreed to pay to the creditor a further sum of £6000 at a future time. The bankruptcy was annulled on the petition of the bankrupt, with the consent of the creditors or their assignees. The agreement to pay the £6000 was not disclosed to the Court or to the other creditors:—

Held, that there was no duty to disclose the agreement to the Court, inasmuch as the function of the Court was merely to ascertain whether the proper parties consented; nor to the other creditors, inasmuch as there was no common basis of consent, and that the agreement was valid.

Decision of *North*, J., reversed.

THIS was an appeal from a decision of Mr. Justice *North* (1).

In 1886 *James McHenry*, deceased, was adjudicated a bankrupt under the *Bankruptcy Act* of 1869 upon a petition presented in 1879.

A proof by *Gustave Levita* was admitted in the bankruptcy for £25,000, and was assigned by him to his brother, the Appellant *Emil Levita*.

McHenry was desirous of obtaining an annulment of his bankruptcy, and for this purpose he arranged with *H. L. Bischoffsheim*, against whom he had a large claim, and who also desired the annulment of the bankruptcy, that *Bischoffsheim* should provide money for buying up the debts of creditors. Accordingly

(1) [1894] 2 Ch. 428.

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Bischoffsheim paid £40,000 to Messrs. *F. W. R. Hore & St. John Wontner*, which they were to employ in buying up debts which had been proved in the bankruptcy. *Hore & Wontner* in pursuance of this arrangement procured assignments to be made to themselves of several proved debts for various considerations. Among the debts so assigned to them was the debt of £25,000 due to *Emil Levita*.

This assignment was effected by a deed dated the 20th of December, 1889, which contained a recital that the vendor had agreed with the purchasers to sell to them the debt at the price of £2000, and the assignment was expressed to be made in consideration of the sum of £2000 paid by the purchasers to the vendor.

The assignment was made in pursuance of a verbal agreement between *Emil Levita* and *McHenry*, that in consideration of *Levita* assigning his debt to *Hore & Wontner* for £2000 *McHenry* would pay him £6000 at a future time.

The effect of this agreement was communicated to *Hore & Wontner* prior to the assignment, but was not disclosed to the other creditors who had assigned their debts to *Hore & Wontner*.

On the 31st of January, 1890, *McHenry* presented a petition for the annulment of the bankruptcy. The petition stated that all the debts, proofs of which had been admitted, had been paid, satisfied, disposed of, or assigned in the manner appearing in a schedule, and that the persons respectively in whom those debts were then vested were consenting that the adjudication should be annulled, and for that purpose had signed consents at the foot of the petition.

In the schedule it was stated that the proof of *G. Levita* had been admitted for £25,000, and that that debt was then vested in *Hore & Wontner* by a deed dated the 20th of December, 1889. *Hore & Wontner* signed the petition as consenting to the prayer thereof. The assignments of the debts of those creditors who had assigned their debts were produced to the Court upon the hearing of the petition, and copies of those assignments were filed with the proceedings. On the 24th of February, 1890, an order was made annulling the bankruptcy with the consent of the creditors or their assignees.

Emil Levita claimed to prove in the administration of *McHenry's* estate for £6000.

The Chief Clerk allowed the claim.

Upon a summons to vary the certificate taken out by one of *McHenry's* executors, Mr. Justice *North* held that the agreement between *Emil Levita* and *McHenry* was invalid, and that the claim to prove for £6000 could not be admitted. *Emil Levita* appealed.

Finlay, Q.C., and *Clauson*, for the Appellant:—

If this were a scheme of arrangement under which all creditors were to share alike, and if other creditors had been induced to sell their claims on the faith of the Appellant selling his claim for a particular sum, then there might have been some ground for setting aside this agreement; but here the creditors are not acting on any common basis, and no one was misled by the Appellant's conduct.

If the Appellant had entered into a secret agreement for the purpose of affecting the conduct of other creditors, it might have been avoided; but that is not suggested.

The cases relied on by Mr. Justice *North*—*Jackman* v. *Mitchell* (1); *Murray* v. *Reeves* (2); *Hall* v. *Dyson* (3); *Nerot* v. *Wallace* (4)—shew that an agreement cannot be supported which is a fraud upon the other creditors, or which is against public policy, as where a creditor has been induced for a pecuniary consideration to stifle an opposition to the discharge of a bankrupt, or to hush up an inquiry which the law has provided in the public interest. This case is not within the principle of those decisions, but is within the principle of *Smith* v. *Salzmann* (5).

With regard to the practice of the Bankruptcy Court, the Court has only to be satisfied that the proper parties have consented in order to grant an annulment with the consent of the creditors: *Ex parte Green* (6); *Ex parte Duckworth* (7); *Ex parte Jones* (8); *Montagu* and *Ayrton's* Law of Bankruptcy (9).

(1) 13 Ves. 581.
(2) 8 B. & C. 421.
(3) 17 Q. B. 785.
(4) 3 T. R. 17.
(5) 9 Ex. 535.
(6) 1 M. D. & D. 174.
(7) 16 Ves. 416.
(8) Law Rep. 3 Ch. 144.
(9) 2nd Ed. vol. ii. p. 138.

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Cozens-Hardy, Q.C., and *Herbert Reed*, Q.C. (*Broxholm*, with them), for the Respondent:—

It is contrary to the policy of the bankruptcy law to obtain an annulment of bankruptcy by which a debt for £25,000 is without the knowledge of the Court converted into a debt for £31,000.

[LORD HERSCHELL, L.C.:—This case appears to me to be undistinguishable from *Smith* v. *Salzmann* (1).]

It is difficult to reconcile that decision with the earlier cases, which are based, not merely on the fact of the secret agreement being a fraud upon particular creditors, but on grounds of high public policy; it is enough to prove a fraud upon the Court: *Jackson* v. *Davison* (2); *Hall* v. *Dyson* (3); *Kearley* v. *Thomson* (4). *Ex parte Jones* (5) shews that it is not a matter of course to grant an annulment of bankruptcy upon the proof of the consent of the creditors.

Upon an application for an annulment, it is a matter of public interest that there should be a full and fair disclosure of all the facts to the Court.

LORD HERSCHELL, L.C. (after stating the facts, continued):—

The question raised by this appeal is whether the Appellant *Emil Levita* can establish his claim to prove against *McHenry's* estate for £6000. It is a debt beyond controversy unless it can be shewn that the agreement between *McHenry* and *Levita*, although made in point of fact, was void in point of law. Of course it can only be void if it was an agreement immoral or against the law as being against public policy. The case was presented in this way. It was said that this promise to pay £6000 was kept back from the knowledge of the other creditors and concealed from the Court; that consequently, having been so concealed both from the creditors and from the Court, it was an agreement which could not be sustained. Dealing first with the argument that the Court has been deceived, that depends entirely upon what duty there was to the Court on presenting a

(1) 9 Ex. 535.
(2) 4 B. & Al. 691.
(3) 17 Q. B. 785.
(4) 24 Q. B. D. 742.
(5) Law Rep. 3 Ch. 144.

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petition of this description, which depends again upon the functions possessed by the Court—upon what evidence the Court ought to require in order to determine whether the bankruptcy should be annulled or not. It appears to me that all that the Court had to consider was whether in point of fact all those persons who were creditors or who represented the creditors by assignment of their debts consented to the annulment and desired it. If they did, then it seems to me that all was established which it was necessary for the Court to know before annulling the bankruptcy. It is laid down in *Ex parte Duckworth* (1) that the requisite to the annulment is the consent of the creditors who have already proved. The only authority brought before our notice suggesting that in such a case the Court might hold its hand was the *dictum* of Lord *Cairns* in *Ex parte Jones* (2), where he said he was not prepared to say that, although all the creditors present consented, it might not be right to withhold the consent to the annulment in the interest of absent creditors. It is unnecessary to express any opinion, whether or not that view is well founded, as that question does not arise in the present case. All we have to consider here is whether there was any necessity to bring before the Court anything more than the fact of the consent of the original creditors or their assignees, and I think there was not. But then it was said that though it may not have been necessary to inform the Court of the considerations which led all the creditors or their assignees to assent, yet if anything further is communicated to the Court it must be communicated truly. But, in the first place, I do not see that there was any untruth in the representation made to the Court. It was perfectly true to say, as was said on the face of the deed, that it was in consideration of £2000 paid by the assignees that this assignment had been made. It was not the less true because there was a collateral agreement between *McHenry* and *Levita* which involved a promise to pay in the future another sum. It seems to me to have been no more necessary to communicate that promise by *McHenry* to *Levita* than it would have been to communicate any promise made by the debtor to any one of his creditors, and it was hardly

(1) 16 Ves. 416. (2) Law Rep. 3 Ch. 144.

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contended by Mr. *Reed* that there was any such obligation. I do not see, therefore, that this was in fact concealed in the true sense of the word from the Court. But it seems to me to be further clear that not to communicate immaterial facts—facts which would not, or ought not to, have affected the judgment of the Court if they had been communicated—can never be a ground for avoiding a transaction or for saying there has been a breach of duty. Every person who makes an application to the Court is bound to disclose all that is material. He is bound not to mislead the Court into supposing the material facts to be other than they are; but to say that he is bound to state to the Court every immaterial fact appears to me to be a notion of duty very far from exact. Therefore, I cannot see in the present case how it can be said that the Court was deceived or misled.

Then as regards the other creditors, if this were a case in which all the creditors were dealing on a common basis, or were understood to be dealing on a common basis—that is to say, if they were acting together and were consenting to an annulment in consideration of receiving some proportionate shares or some named shares out of a fund that was to be distributed among them—then I agree that any person who was bargaining behind the rest for a private advantage could not maintain the transaction for a moment. Or I would go further, and say, that if any bargain made by one creditor were to his knowledge to be kept back in order that the other creditors might be induced to take the course of assenting to an annulment upon the supposition that he was receiving less than he really was receiving, that again would be in the nature of a fraud upon the creditors, and the transaction could not be supported. But in the present case nothing of the kind appears. There is no pretence for saying that the creditors were being treated on the same basis by any proportionate payments; and, further, there is no evidence that Mr. *Levita* was a party to any such concealment as is alleged. Mr. *Levita* had nothing to do with the petition for annulment, or the form which it took, or the facts which were disclosed in it. I cannot see a trace of his having given any direction or made any suggestion to the assignees or to *McHenry* that this promise to pay £6000 was to be concealed in any way. It was

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made known to the trustees, and I cannot see a trace of any agreement that it should be kept back from anybody. If so, that seems to me to be conclusive of one part of the case which was put forward by Mr. *Reed*, because even if this agreement could be void because concealed, it could only be so if it were concealed by arrangement between the debtor and the creditor. If it was an agreement not intended to be concealed from the Court, the fact that *McHenry* himself chose to conceal it could not enable him afterwards to treat the transaction as void. I think that the learned Judge has apparently, by an oversight, regarded this as a case in which the effect of the transactions was to discharge the debtor. He said: "The order of annulment was obtained from the Court upon the footing that the debtor had settled with all his creditors who had proved claims against him, and would start from that time forward as free from the claims of the creditors in the bankruptcy." That is of course a mistake. He did not become discharged at all. When the bankruptcy was annulled, every right of every creditor came into existence with the same force as it had before his adjudication.

Now, as regards the cases, none of them really are authorities for the propositions contended for by the Respondent. In *Jackman* v. *Mitchell* (1), which was the first case cited, the plaintiff, the bankrupt's son, in order to induce the defendant, who was the largest creditor, to execute a deed of composition and thereby to get the other creditors to follow his example, executed a bond, which was not communicated to the other creditors, to secure the deficiency of the debt and interest due to the defendant beyond the composition. That was held bad. One can hardly conceive a clearer case of fraud upon the other creditors who were to be induced to suppose that the largest creditor was consenting on certain terms, and to agree to these terms, when both parties to the bond knew that that did not represent the truth. It was obvious that the transaction in that case could not stand. Then the next case cited was *Hall* v. *Dyson* (2). That was a case in which there was an agreement by the attorney of an insolvent with one of the creditors who had given notice of opposition to his discharge that for a certain

(1) 13 Ves. 581. (2) 17 Q. B. 785, 791.

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sum of money he would not oppose. Lord *Campbell* held that that was a fraud on the insolvency laws. He said: "In the present case, the creditor is, as it were, bought off; and he was under a moral obligation to continue his opposition, inasmuch as, by giving notice of it, he had led other creditors to believe that he really intended to oppose. The consequence of his withdrawing is that justice is disappointed." What bearing that has upon such a case as the present I am at a loss to conceive, because I do not see any moral obligation on Mr. *Levita* here with regard to the other creditors whose transactions we are considering. The third case was *Murray* v. *Reeves* (1), which is a case of the same description as *Hall* v. *Dyson* (2). Then the next case was *Nerot* v. *Wallace* (3), where a promise was made by a friend of the bankrupt, when he was on his last examination, that in consideration that the assignees and commissioners would not examine him on certain matters he would pay such sums as the bankrupt had received and not accounted for. That was held void as being against the policy of the bankruptcy laws as tending to hush up malpractices, instead of in the public interest securing full inquiry into them. None of those cases seem to me to bear at all on the present. For the reasons I have given I am unable to agree with the learned Judge, and I think that this appeal must be allowed.

LINDLEY, L.J.:—

I am of the same opinion. The key to this case is to be found in the fact that when creditors consent to the annulment of adjudication of bankruptcy each creditor consents upon such terms as he may think proper. They do not work in unison. It is not like a composition deed or anything of that kind. The bankrupt makes the best arrangement he can with each creditor, and all the Court usually inquires into is whether that creditor consents. It is very unusual—I do not say it never happens—that anybody should inquire into the terms upon which that consent is given, and no creditor who does consent does in fact

(1) 8 B. & C. 421. (2) 17 Q. B. 785.
(3) 3 T. R. 17.

represent to the others that he does so upon any particular terms. There is no common basis of consent, and no creditor can say with truth, "I consented upon the supposition that you were consenting upon the same terms as myself." That is not the present arrangement. Each creditor makes his own bargain. When once you get that clearly before you it is difficult to see what objection there is to this alleged concealment. Now the facts were these. *Levita* had proved his debt for £25,000; the bankrupt wanted him to assign that to two persons named *Hore* and *Wontner*, and *Levita* says, "Very well, I will if you will promise to pay me £6000 by-and-by if I make that assignment." The assignment is made. The assignment is made in consideration of £2000 paid by the purchasers of the debt to *Levita*. After that *Levita* has no more to do with £25,000 debt than I have; but the effect of that assignment is that the persons who are to consent are the purchasers of that debt. They do consent. They state with perfect truth that the debt has been assigned to them in consideration of £2000. So it has. There is nothing concealed. It is very true that the history of that transaction was not communicated to the Court, nor need it have been, as far as I can see. It appears to me, I confess, that the learned Judge has gone wrong by considering that the bankrupt was freed from his original debts by discharge, and that there has been some unfair advantage as regards these assets obtained by one of the creditors over the others. I do not think that is so. When you come to look into the authorities they are clearly distinguishable, not only on the facts, but upon the principles applicable to them. The nearest authority that bears upon this case is *Smith* v. *Salzmann* (1), where Baron *Parke*, speaking of the agreement which was there in question, says very pertinently: "Unless it was shewn that the agreement was entered into upon the understanding that all the creditors were to be upon the same footing, and that the plaintiff was put upon a better footing, or that the plaintiff signed the petition for the purpose of deluding the other creditors to do so, there is no fraud." That decision is very like this, for it happened to be an annulment case. I do not see that there is anything which taints this

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(1) 9 Ex. 535, 543.

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promise to pay *Levita* £6000. I think that the view taken by the Chief Clerk was right, and that the appeal ought to be allowed.

DAVEY, L.J.:—

I am also of opinion that this appeal must be allowed. I am of opinion that the Respondent's counsel have entirely failed to satisfy the Court that there has been any fraud either upon the Court or upon the creditors themselves. I should be sorry that anything which fell from us should in the least degree weaken the salutary rule that those who apply to the Court for an order are bound at their own risk to state all material facts, and that if they fail to disclose any material facts they are liable to have any order which may be obtained set aside. But that applies only to material facts, and I fail to see now, when the case is understood, that any material facts were withheld from the Court. The function of the Court seems to me to have been confined to seeing that all the creditors consented, including under the name of creditors those who had become the assignees of debts which had been proved. Of course, for the purpose of proving the title of those assignees, the deeds of assignment had to be produced; but I conceive that the only function of the Court was to see that it had the proper parties before it to give consent. I am therefore of opinion, for the reasons which have already been stated by the learned Lord Chancellor, that there was no fraud upon the Court. Nor can I see that there was any fraud whatever upon the creditors. Each creditor was at liberty to make his own bargain. It was utterly unlike a composition, the principle of which is that all the creditors share alike. Each creditor was entitled to make his own bargain, and unless it can be proved that a creditor was induced to part with his debt for a smaller sum in consideration of this creditor, *Levita*, having agreed to accept £2000 only, I fail to see how there can be any fraud upon the creditors. The creditors consented before the petition was presented, and the creditors gave their consent, not on account of anything which had taken place between *Levita* and *Wontner* and *Hore*, or between *Levita* and *McHenry*, but each in consequence of the negotiations which had been conducted

with himself, and in which each creditor made the best bargain he could in his own interest.

The cases which have been referred to seem to me capable of being divided into two classes—first, cases where a secret inducement is offered to one creditor to execute a composition deed or to accept a composition on the footing that all the creditors share alike. Of course it would be an obvious fraud on the other creditors who agree to accept a composition payable *pro ratâ* to all if one creditor was enabled by a secret bargain to obtain a better advantage for himself, and that would be all the more so where, as in modern cases, a specified majority of the creditors have power to bind the minority. The second class of cases is where a creditor has been induced to withdraw his opposition to the insolvent or bankrupt, or to withdraw a bankruptcy petition in consideration of some pecuniary advantage. There it has been held that the creditor in opposing the insolvent or bankrupt, or in presenting a bankruptcy petition, is acting on behalf of the creditors generally, and for this reason, that if he did not put himself forward to present a bankruptcy petition, or to conduct the opposition and so secure the public examination of the debtor, other creditors would do so; and there is the further reason, that it is a matter of public interest that the public examinations of a debtor should not be stifled. I am of opinion that none of the decided cases are adverse to Mr. *Finlay's* argument, and I think the case of *Smith* v. *Salzmann* (1) supports the view that we are taking of this case. I am, therefore, of opinion that the appeal ought to be allowed.

Solicitors: *Linklater & Co.; Hores & Pattisson.*

(1) 9 Ex. 535.

H. C. J.

C. A.
1894
July 30.

HOOD BARRS *v.* CATHCART.

[1892 B. 5971.]

Married Woman—Separate Estate—Restraint on Anticipation—Unsuccessful Appeal—Costs—"Proceeding instituted"—Married Women's Property Act, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.

The words "action or proceeding instituted," in sect. 2 of the *Married Women's Property Act*, 1893—under which the Court may now order payment of costs out of property of a married woman which is subject to a restraint on anticipation—mean some action, or proceeding in the nature of an action, initiated by a married woman as plaintiff, and do not include any motion or step made or taken by a married woman in an action in which she is defendant.

Accordingly, where, since the Act, an appeal by a married woman, Defendant in an action, had been dismissed with costs:—

Held, that the Court had no jurisdiction to order payment of the Plaintiff's costs of that appeal out of property of the Defendant which was subject to a restraint on anticipation.

IN 1892 this action was brought in the Queen's Bench Division by the Plaintiff against Mrs. *Cathcart*, a married woman—who was entitled under her marriage settlement to the income of the settled property for her separate use without power of anticipation—for the recovery of a debt, and the Plaintiff ultimately obtained judgment for the amount of the debt and costs. From that judgment the Defendant appealed to the Court of Appeal, but the appeal was dismissed with costs. These last-mentioned costs not being satisfied, a writ of sequestration for their recovery was, by leave, issued against the Defendant. On the 19th of October, 1893, she applied to the Vacation Judge for a stay of proceedings under the writ of sequestration, but the application was dismissed. The sequestrators were unable to find property available to satisfy the writ.

On the 5th of December, 1893, the *Married Women's Property Act*, 1893, came into operation.

On the 14th of December, 1893, the Defendant appealed to the Divisional Court from the order of the Vacation Judge, but the appeal was dismissed with costs. She then appealed to the Court of Appeal, but on the 12th of February, 1894, that appeal was also dismissed with costs.

On the 6th March, 1894, the action was ordered to be transferred to the Chancery Division before Mr. Justice *North*.

The original writ of sequestration having been dissolved, the Plaintiff, on the 25th of June, 1894, took out a summons before Mr. Justice *North* for leave, under Order XLIII., rule 7, to issue a writ of sequestration against the Defendant's separate property, "notwithstanding any restraint against anticipation," for the costs under the orders of the 14th of December, 1893, and the 12th of February, 1894. This summons came before his Lordship in Chambers on the 2nd of July, 1894, when he made an order giving the Plaintiff leave to issue a writ of sequestration for the costs in question against the Defendant's "separate estate" generally; but on the 19th of July, upon the matter coming before him in Court, his Lordship discharged that order, upon the ground that the affidavit in support of the application for it did not disclose that there was any property which the sequestrators could seize.

The Plaintiff appealed.

The appeal was heard on the 30th of July, 1894. The points before the Court of Appeal were two: first, whether there was evidence that the Defendant had separate property not restrained from anticipation available for sequestration—a point which, as it turned upon the affidavit of the Plaintiff, does not call for a report; and secondly, whether, under sect. 2 of the *Married Women's Property Act*, 1893 (1), the costs in question could be ordered to be paid out of the Defendant's separate property which was subject to the restraint on anticipation.

Hopkinson, Q.C., and *C. Johnston Edwards*, for the Plaintiff:—

We do not raise any question as to the costs of the Queen's Bench appeal, which was before the *Married Women's Property*

(1) Sect. 2 of the *Married Women's Property Act*, 1893, which came into operation on the 5th of December, 1893, is as follows:—

"In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just."

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Act, 1893, came into operation; for any previous order against the Defendant for payment of costs by the Defendant must be limited to her separate property not subject to restraint on anticipation: *Scott* v. *Morley* (1). But as to the costs of the appeals since the Act, namely, those of the 14th of December, 1893, and the 12th of February, 1894, we submit they are within sect. 2. The words "proceeding instituted" are wide enough to include any step, such as a motion by way of appeal or otherwise, instituted or started by a married woman in an action. The question is, who is the moving party? If a married woman, then the Act applies.

The sequestration being for costs, it was necessary to obtain leave to issue the writ: Order XLIII., rule 7: *In re Lumley* (2).

The Defendant, Mrs. *Cathcart*, appeared in person, but was not called upon.

LINDLEY, L.J.:—

The substantial question before us is the last raised, namely, whether sect. 2 of the *Married Women's Property Act*, 1893, applies to this case. Mr. *Hopkinson* contends that it does. He says that the Defendant's appeal from the Queen's Bench Division, which was dismissed with costs, was made before the Act came into operation, and is therefore not affected by it, but that the appeals by her of the 14th of December, 1893, and the 12th of February, 1894—that is, since the Act came into operation, which was on the 5th of December, 1893—were "proceedings instituted" by her within the meaning of sect. 2. That section, which is an extremely important one, enacts as follows. [His Lordship read the section, and continued:—]

The question is, What is the true construction of the words, "In any . . . proceeding now or hereafter instituted by a woman or by a next friend on her behalf"? Mr. *Hopkinson* says those words include an appeal, or an application of any other kind, by a woman who is being sued. In my opinion, the language of the section is not capable of that construction. It appears to

(1) 20 Q. B. D. 120. (2) [1894] 2 Ch. 271.

me that the word "instituted" is an important one, and that the expression "proceeding instituted" means some action in which a married woman is the actor, in the sense of having started it, and does not include motions made by a married woman who is a defendant, or appeals by a married woman who is a defendant. I do not think the language of the section is large enough to hit such a case as the present. An appeal is not a "proceeding instituted" as the expression is understood by lawyers. Therefore, in my opinion, this case must be treated as undistinguishable from those that were before the Court prior to the Act.

[Upon the other point, his Lordship held that he was not satisfied by the Plaintiff's affidavit that there was any property which could be reached by sequestration; and that accordingly, on both points, the appeal must be dismissed with costs.]

LOPES, L.J.:—

The costs in question in this case are costs in respect of certain appeals which have been dismissed; and the question which arises with regard to those costs is an important one under sect. 2 of the *Married Women's Property Act*, 1893. The question raised is, whether that section includes an appeal. In my judgment, it does not.

The expression "proceeding instituted" conveys to my mind the idea of some action commenced or proceeding initiated; as, for instance, an originating summons, or any summons which is the initiation of the matter which has to be dealt with—a proceeding in which a married woman is the first and prime mover.

[His Lordship also held that the learned Judge below was right in his view of the Plaintiff's affidavit.]

DAVEY, L.J.:—

I am of the same opinion, and, were it not that this is the first occasion on which the construction of this section has come before us, I should have contented myself with simply expressing my concurrence with the judgments that have just been delivered.

Mr. *Hopkinson's* contention is that the words "proceeding instituted" include any motion or step taken by a married

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Davey, L.J.

woman in an action in which she is defendant. This contention, in my opinion, is not borne out by the language of the section.

It must be borne in mind that an appeal is in reality in the nature of a defence by the person against whom an order has been made. Now, I take it that the words "action or proceeding" must mean some action, or some proceeding in the nature of an action; that is to say, a proceeding in which a *lis* is initiated; and it appears to me that "instituted" would be an inapt word for any such proceeding as has been suggested by Mr. *Hopkinson*. I have never myself heard of an appeal being "instituted," and I do not suppose any one ever heard of such an expression being applied to an appeal; whereas "instituted" is an apt word for the commencement of a suit, and I think the use of the words "from time to time" points out what is meant. The words are "the Court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party," and so on. That is to say, wherever a married woman commences an action or litigation as plaintiff, then, if at any stage or in any proceeding in that action, she is ordered to pay the costs, the Court may, in such an action or litigation, order those costs to be paid out of her separate estate, notwithstanding any restraint on anticipation.

Upon the other point I have nothing to add.

I will only add that the costs which the Plaintiff is ordered to pay in this action will be set off against any costs the Defendant has been ordered to pay.

Solicitors for Plaintiff: *Hood Barrs & Co.*

G. I. F. C.

C. A
1894
July 31.

In re WOOD.
TULLETT *v.* COLVILLE.

[1893 W. 2282.]

Will—Construction—Remoteness—Trust to Work out Gravel Pits and then Sell—Gift of Proceeds of Sale to Unascertained Class—Gift to Children of Testator for their Lives with Remainder to their Respective Children—Children of Child Dead at date of Will.

A testator directed his trustees to carry on his business of a gravel contractor until his freehold gravel pits were worked out, and then to sell them, with power for his sons, or any of them, to bid at the sale; and he directed his trustees to hold the proceeds of sale in trust for such child or children of his "then living," and such issue living of any child or children then deceased, as should, being a son or sons, attain twenty-one, or, being a daughter or daughters, attain that age or marry, in equal shares *per stirpes*. And he declared it to be his wish that, until such sale, his sons should continue to be employed in the business.

The testator directed his trustees to hold all the residue of his real and personal estate upon trusts for sale and investment, and to divide the income thereof equally amongst all his children during their respective lives, and upon the death of any such child, whether before or after his own death, to hold the *corpus* whereof the income was or would have been payable to such child, upon trust for all or any the child or children of such child, who, being a son or sons, should attain twenty-one, or, being a daughter or daughters, should attain that age or marry, and if more than one in equal shares:—

Held, that both the trust for the sale of the gravel pits and the trust declared of the proceeds of sale were void for remoteness:

Held, also, that the children of a daughter of the testator who was dead at the date of his will were not included in the residuary gift.

Decision of *Kekewich*, J., affirmed.

APPEAL against a decision of Mr. Justice *Kekewich* (1).

William Wood, a gravel contractor, by his will, dated the 29th of February, 1872, devised and bequeathed all his real estate, and all the residue of his personal estate unto and to the use of *William Tullett* and *George Wood*, their heirs, executors, and administrators, upon trust to dispose thereof according to the directions thereinafter contained. And he directed his trustees "to carry on my business of a gravel contractor until my gravel

(1) [1894] 2 Ch. 310.

C. A. 1894 *In re* WOOD. TULLETT *v.* COLVILLE.

pits are worked out, and then to sell the said gravel pits and the freehold land on which the same are situate . . . by public auction, either together or in lots, . . . with full power for my sons, or any of them, to bid at such sale. And I direct my trustees to hold the proceeds of such sale in trust for such child or children of mine then living, and such issue living of any child or children then deceased, as shall, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or marry, in equal shares, but so that the issue of my deceased children may take the share or the respective shares only that the parent or respective parents would have taken if living. And it is my wish and intention that, until such sale as aforesaid, my sons, or such of them as may be willing to do so, shall continue to be employed in the said business as heretofore at the usual wages."

And as to all the residue of his real and personal estate the testator directed his trustees to hold the same upon trusts for sale and conversion and investment as therein mentioned, "and shall pay and divide the income of the said trust premises equally amongst all my children during their respective lives (nevertheless in the manner and upon the terms and subject to the discretionary powers hereinafter declared), and shall upon and from the death of any such child, whether before or after my death, hold the *corpus*, whereof the income is or would have been payable to such child, upon trust for all or any the child or children of such child, who, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or marry under that age, and, if more than one, in equal shares," and in default of any such child or children of his said child, then in trust as therein mentioned.

The testator appointed his trustees to be executors of his will. He died on the 24th of March, 1872. He had had twelve children, all of whom survived him, except a daughter, Mrs. *Colville*, who had died before the date of the will, leaving issue who were still living.

The gravel pits referred to in the will were about six acres in extent. At the date of the testator's death the whole had been worked out except about half an acre. After his death his

trustees carried on his business, and continued working the pits. There was evidence that, with the ordinary staff of workmen employed by the testator, working the usual number of hours per day, the remaining half acre would have been worked out in from three to four years from the death of the testator. The trustees employed a smaller staff of men, and the half acre was not worked out until May, 1878. The trustees thereupon at once sold the horses, carts, and stock-in-trade, and, as opportunity offered, they sold portions of the pits and freehold land.

Mr. Justice *Kekewich* held that the trust for sale of the gravel pits and the trust declared of the proceeds of sale were both void for remoteness, and that Mrs. *Colville's* children could not take under the residuary gift. The Defendant *W. E. Colville*, one of Mrs. *Colville's* children, appealed.

Cozens-Hardy, Q.C., and *Rowden*, for the Appellant:—

The pits were in fact worked out six years after the testator's death, and it was clearly impossible that the working could continue for twenty-one years after his death.

But, as a matter of construction, the will shews on its face that the sale was to take place during the life of some one son of the testator, for any of the sons was to have power to bid at the sale, and the sons were, if they were willing, to continue until the sale to be employed in the business. In effect, it is as if the will had contained this proviso, "provided that the sale shall take place during the life of one of my sons." If that had been said expressly, the gift would clearly have been valid. *In re Dawson* (1) is distinguishable; the rule as to the inadmissibility of evidence that a woman is past the age of child-bearing stands *per se*. *Lachlan* v. *Reynolds* (2) shews that the trust for sale is not too remote. Evidence would have been admissible that the testator had worked out the pits a week before his death; why should not evidence be admitted to shew that the working could not last for so much as twenty-one years after his death?

The class which is to take the proceeds of sale is capable of taking; the maximum number must be ascertained within the legal period.

(1) 39 Ch. D. 155. (2) 9 Hare, 796.

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[DAVEY, L.J., referred to *Pearks* v. *Moseley* (1).]

The learned Judge did not give sufficient weight to *Wood* v. *Drew* (2).

[LINDLEY, L.J.:—In that case the persons who were to take were ascertained.]

In *In re Daveron* (3) it was held that the persons who were under a will to take the proceeds of the sale of a freehold house were entitled to the benefits intended for them by the testator, notwithstanding that the trust for sale was too remote, inasmuch as they could elect to take the property as real estate. No doubt there the beneficiaries were ascertainable within the legal period.

If, however, the trust for sale and the gift of the proceeds are invalid, the property will fall into the residue, and under the residuary gift the Appellant is entitled to a share. There is enough to shew that the children of the daughter who was dead at the date of the will were not to be excluded. The gift to the children of a deceased child is not a substitution for the deceased child, but is a new and independent gift to the children. The gift is in an unusual form, and an intention is clearly manifested that grandchildren of the testator are not to suffer by reason of the death of their parent before the date of the will. The gift is to "all my children," not "children living at my death." It is a stirpital gift: *In re Lucas's Will* (4).

[DAVEY, L.J., referred to *In re Hotchkiss' Trusts* (5).

Warrington referred to *In re Chinery* (6).

LOPES, L.J., referred to *In re Musther* (7).]

The words "whether before or after my death" are material.

Warrington, for the Defendant *Richard Wood*; *Benn*, for the Defendant *Thomas Wood*; and *C. E. E. Jenkins*, for the Plaintiffs; were not called upon.

(1) 5 App. Cas. 714, 723.
(2) 33 Beav. 610.
(3) [1893] 3 Ch. 421.
(4) 17 Ch. D. 788.
(5) Law Rep. 8 Eq. 643.
(6) 39 Ch. D. 614.
(7) 43 Ch. D. 569.

Lindley, L.J.:—

This appeal from a decision of Mr. Justice *Kekewich* turns entirely upon the construction of the will of a testator who owned some gravel pits. There are two questions—(1.) whether the directions contained in the will for the sale of the gravel pits and the division of the proceeds of sale are void for remoteness; (2.) whether the Appellant is entitled to a share of the residue of the testator's estate, which would include the proceeds of the sale of the gravel pits, if the gift of those proceeds is too remote.

The first question is, whether the direction to sell the gravel pits and to divide the proceeds of sale is void under the doctrine of perpetuities. Mr. *Rowden* contended that on the construction of the will it is reasonably clear that the sale must take place within the lifetime of some one of the testator's sons, and he relied upon two of the clauses of the will—the power given to the sons, or any of them, to bid at the sale, and the provision that, until the sale, the sons, or such of them as might be willing to do so, should continue to be employed in the business as theretofore at the usual wages. In my opinion that argument is not tenable.

Then arises the question, whether the fact that the pits were nearly worked out at the death of the testator, and that they were worked out about six years after his death, will exclude the operation of the rule against perpetuities. I think the law on this subject is correctly stated in *Theobald* on Wills (1) thus: "In applying the rule against perpetuities, the state of things existing at the testator's death, and not at the date of the will, is to be looked at. But possible and not actual events are to be considered, and, therefore, if at the testator's death a gift might possibly not have vested within the proper time, it will not be good, because, as a matter of fact, it did so vest." The learned writer refers to *Lord Dungannon* v. *Smith* (2), and *In re Roberts* (3). We have also been referred to *In re Dawson* (4), where the cases were reviewed by Mr. Justice *Chitty*. The law on that point is as old as Lord *Kenyon*; it was settled in *Jee* v. *Audley* (5). The

(1) 3rd Ed. p. 401.
(2) 12 Cl. & F. 546.
(3) 50 L. J. (Ch.) 265.
(4) 39 Ch. D. 155.
(5) 1 Cox, 324.

C. A. 1894 *In re* WOOD. TULLETT *v.* COLVILLE. Lindley, L.J.

time for the sale of the gravel pits would not necessarily arise within the period of a life in being at the death of the testator and twenty-one years afterwards. Then when you endeavour to ascertain the class who are to take the proceeds of the sale you cannot do it within the period. Both the direction to sell and the disposition of the proceeds are therefore void as being within the rule against perpetuities.

Then comes the question whether the Appellant can take under the gift of residue. [His Lordship read the residuary clause.] The Appellant is a child of a daughter of the testator who was dead at the time when he made his will. We have not to deal with the case of a child of a child of the testator who died between the date of his will and the date of his death. Is it possible to say that the words "during their respective lives" could have been intended to apply to a child who was dead at the date of the will? You cannot include the Appellant's mother within the residuary gift, and, therefore, apart from all authorities, it is impossible to include the Appellant himself. But, looking at the authorities, and with all deference to the decision of Vice-Chancellor *Malins* in *In re Potter's Trust* (1), I think they are clear that the child of a child of the testator who was dead at the date of his will cannot take under this gift. The decision of Mr. Justice *Kekewich* was right, and the appeal must be dismissed.

LOPES, L.J. :—

I am of the same opinion. It appears to me that the trust for the sale of the gravel pits is too remote, for it would not necessarily arise within the period prescribed by law. The gift of the proceeds of sale is, I think, also too remote, for it would be impossible to ascertain all the persons who were to take within the legal period. The proceeds are to be held in trust for the child or children of the testator "then living," *i.e.*, living when the gravel pits were worked out. No one could at the death of the testator tell when that would be. It has been argued that the fact that the pits were worked out in six years

(1) Law Rep. 8 Eq. 52.

after the testator's death ought to be taken into consideration, but the authorities shew that that cannot be done.

As to the residuary gift, the words are too strong for us to get over.

Davey, L.J.:—

I am entirely of the same opinion, and I agree with the reasons which have been given for holding that the trust for sale was too remote. As I understand the law, if there is a gift to a class, all the members of which will not necessarily be ascertained within the legal period, the gift will be void as being too remote. The Court is not at liberty to speculate about probabilities, or to inquire as to what actually took place after the death of the testator. The Court can look at evidence of facts existing at the death of the testator, but not at evidence of opinion or probability. It might have been in the highest degree probable at the time of the testator's death that the gravel pits would be worked out within the legal period; but, as I understand the law, the Court cannot look at evidence of that kind. It may be that, if the gravel pits had been entirely worked out at the date of the testator's death, the trust for sale would never have arisen—I do not say whether that would have been so or not—but evidence of that kind would have been evidence of fact, not of opinion.

As to the second point, I think the matter is concluded by authority. *In re Chinery* (1) was extremely like the present case. The words of the two wills are not, of course, identical; but, in principle, I am wholly unable to distinguish between the two, and I think that *In re Chinery* was rightly decided. It is true that in the long line of cases on the subject there are differences in the language used; but the principle is the same in all of them. Notwithstanding the opinion expressed by Vice-Chancellor *Malins* in *In re Potter's Trust* (2), I think that *Christopherson* v. *Naylor* (3) was rightly decided, and so the Court of Appeal held in *In re Musther* (4). But, putting aside authority, I should have come to the same conclusion upon the words of this

(1) 39 Ch. D. 614.
(2) Law Rep. 8 Eq. 57.
(3) 1 Mer. 320.
(4) 43 Ch. D. 569.

C. A. 1894 *In re* WOOD. TULLETT *v.* COLVILLE.

particular will. The gift to children of a child is "upon the death of any such child." The expression "such child" must mean a child who at the date of the will was capable of taking under the prior words a tenancy for life, and it would, in my opinion, be forcing the words to hold that they included a child who was then dead, and, therefore, incapable of itself benefiting by the testator's bounty.

Solicitors: *Pownall & Co.; Snow, Snow, & Fox.*

W. L. C.

C. A. 1894 ROMER, J. *June* 8, 9. C. A. *Aug.* 1.

GUYOT *v.* THOMSON.

[1893 G. 2250.]

Patent—Exclusive License—Non-payment of Royalty—Improvements introduced by Licensee—Revocation of License—Injunction.

A patentee, in consideration of a sum of money paid down and of royalties thereafter to be paid, by deed granted an exclusive license for the manufacture and sale of the patented articles manufactured according to the patent. The licensees covenanted to pay the royalties and to push the invention, and were authorized to grant sub-licenses. They had express power to revoke the license, but no such power was reserved to the patentee. Disputes arose in consequence of improvements made by the licensees in the patented invention to which the patentee objected as deviations from the patent, and the royalty was withheld; thereupon the patentee by notice in writing purported to revoke the license:—

Held, (1.) that the license was not revocable at the will of the patentee; (2.) that there had been no such breach of the conditions contained in the deed as would justify a revocation.

Decision of *Romer*, J., affirmed.

BY deed dated the 28th of February, 1891, and made between the Defendant *D. Thomson* (thereinafter called "the patentee") of the one part, and the Plaintiffs *P. Guyot* and *E. Guyot*, trading in co-partnership under the style of *Redpath & Paris* (thereinafter called "the licensees"), of the other part, after recitals to the effect that the patentee was the proprietor of letters patent dated respectively the 6th of March, 1884, and the 19th of October, 1887, for two inventions which were worked in the market by the name of "*Thomson's* Patent Combined Circulator

and Feed Water Heater for Steam Boilers," and had agreed with the licensees to grant them an exclusive license to manufacture, use, and vend the said inventions upon the terms thereinafter expressed, it was witnessed that in pursuance of the said agreement, and in consideration of the sum of £150 (the receipt, &c.), and of the royalty thereinafter reserved, and of the covenants on the part of the licensees thereinafter contained, the patentee as beneficial owner thereby granted "unto the licensees, their executors, administrators, and assigns the sole, full, and exclusive license to use and exercise the said inventions and each of them during the unexpired residues of the terms of the said letters patent respectively, or any renewal or extension thereof, and to manufacture, sell, and dispose of all circulators and feed water heaters manufactured according to the said inventions, or either of them, when and as the licensees shall think fit for their absolute benefit." And it was thereby mutually covenanted and agreed between and by the said respective parties thereto as follows:—

(1.) "The licensees shall pay to the patentee during the term of this license for every circulator and feed water heater manufactured in accordance with the said inventions, or either of them, and sold, the sum of £10, provided always that in the event of the licensees granting sub-licenses to any persons, companies, or firms, to use and exercise the said inventions or either of them, and manufacture and sell the circulators and feed water heaters manufactured in accordance with the said inventions, or either of them, the licensees shall grant such sub-licenses upon the terms of the persons, companies, or firms to whom such sub-licenses are granted, paying to the licensees for every circulator and feed water heater manufactured in accordance with the said inventions or either of them and sold by them the sum of £15. The said royalty payable to the patentee shall become due and be paid within one calendar month after the expiration of each six calendar months ending on the 30th of June and on the 31st of December in each year, in respect of all such circulators and feed water heaters paid for during the preceding six calendar months." (2.) "The licensees shall at all times during the continuance of this license advertise and push the sale of the said

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inventions, and use their best endeavours to further their success." (3.) "The licensees shall at all times during the continuance of this license keep correct and regular accounts in their books containing full entries and particulars of all circulators and feed water heaters manufactured under this license, and of the sales thereof . . . ." (4.) "The patentee shall not commence proceedings at law or in equity for infringement of the said patents or either of them without the consent in writing of the licensees first had and obtained." And it was thereby agreed that the licensees might at any time thereafter determine the said license on giving six calendar months' notice in writing to the patentee at his last known place of abode in *England*. But the deed contained no power for the patentee to revoke the license. This license was duly registered.

Disputes subsequently arose between the Plaintiffs and the Defendant by reason (amongst other things) of certain alterations and modifications introduced by the Plaintiffs into the apparatus which they manufactured under the license, and which they alleged were improvements on the Defendant's inventions, but to which he strongly objected. In consequence of these disputes the Plaintiffs withheld royalties after the time when they were payable; and ultimately in October, 1893, the Defendant served the Plaintiffs with the following notice:—

"Whereas by an indenture made the 28th day of February, 1891, I granted to you a full and exclusive license to use and exercise my inventions relating to an 'improved method of and apparatus for effecting the circulation in and supply of water to steam boilers' and 'improvements in or relating to apparatus for effecting circulation and supply of water to steam boilers,' such license being granted upon certain terms and conditions, amongst others:

"(*a*) That the royalty payable to me under such license should become due and be paid within one calendar month of the expiration of six calendar months ending the 30th of June and the 31st of December in each year in respect of all circulators and feed water heaters paid for during the preceding six calendar months.

"(*b*) That you should at all times during the continuance of

the license advertise and push the sale of the said inventions and use your best endeavours to further their success.

"And whereas you have absolutely failed to comply with the conditions set forth in paragraphs (*a*) and (*b*) above written.

"And whereas you have manufactured and sold apparatus purporting to be apparatus manufactured under and in pursuance of my specifications and letters patent numbered respectively, 4491, dated the 6th of March, 1884, and 14,233, dated the 19th of October, 1887, when in fact such apparatus were not manufactured in accordance with such specifications and letters patent, such deviations from my said specifications and letters patent being made not only without my permission but against my express directions, and rendering the said apparatus inefficient and incapable of doing the work for which they are intended, whereby I have suffered, and continue to suffer, great damage and injury. Now, I hereby give you formal notice that I revoke the said license granted by the said indenture of the 28th of February, 1891, as from the date hereof.

"And I hereby give you further notice that I shall forthwith proceed to advertise for and obtain orders for the supply and fixing of the said apparatus comprised in my said letters patent, and shall proceed to manufacture and sell the same as though the said license of the 28th of February, 1891, had not been granted."

The Defendant also represented to the customers of the Plaintiffs and to other persons, that the circulators and feed water heaters supplied to them by the Plaintiffs as "*Thomson's* Circulators and Feed Water Heaters" were not made according to the said inventions, but were spurious imitations thereof, and were not proper "*Thomson's* Circulators and Feed Water Heaters."

Thereupon the Plaintiffs commenced this action, and by their statement of claim insisted that the notice was void and of no effect, and that notwithstanding the same notice the exclusive license granted by the said indenture of the 28th of February, 1891, has ever since the date thereof remained in full force, and claimed—(1.) An injunction to restrain the Defendant, his servants, &c., during the continuance of the license, from either

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directly or indirectly using, exercising, or putting in practice the inventions comprised in the said letters patent or either of them, or any part thereof respectively, and from manufacturing or selling or causing or permitting the manufacture or sale of any circulators and feed water heaters or apparatus known or described as "*Thomson's* Patent Combined Circulator and Feed Water Heater for Steam Boilers," or constructed or arranged according to the said inventions or either of them or any part thereof respectively. (2.) An injunction to restrain the Defendant, his servants, &c., from offering for sale or advertising, or by letter, advertisements, circulars, or otherwise representing himself as entitled to manufacture, supply or sell, or as manufacturing, supplying or selling the circulators and feed water heaters or apparatus aforesaid. And from soliciting or endeavouring to obtain orders for the circulators and feed water heaters or apparatus aforesaid except for the licensees. And from representing to the Plaintiffs' customers, or any other persons, or to the public by letters, circulars or otherwise, that the circulators and feed water heaters hitherto supplied by the Plaintiffs are not made according to the said inventions, or are spurious imitations thereof.

The Defendant, by his statement of defence, relied on his said notice and on the breaches therein alleged, and counter-claimed for a declaration that the license had been revoked and determined by the said notice; and, in any event, for payment of the royalties due to him.

This was the trial of the action. It came on for hearing before Mr. Justice *Romer* on the 8th of June, 1894.

It appeared that in another action—to which the Plaintiffs were not parties—it had been recently decided that one of the said letters patent of the Defendant was invalid; but it was agreed that neither of the parties to the present action could avail themselves of that fact.

Expert evidence was adduced on both sides as to the deviations made by the Plaintiffs from the Defendant's drawings and specifications in the apparatus which they had made and sold under their license, the result of which is sufficiently noticed in the arguments and judgment.

Haldane, Q.C., and *W. N. Lawson*, for the Plaintiffs :—

The deed of the 28th of February, 1891, was a grant of the exclusive right to use the invention for the residue of the term, and, in the absence of an express power, is not capable of revocation. With regard to the breaches complained of—advertising is a question of degree. Our evidence shews that we have made all reasonable efforts to push the inventions. Then the alterations introduced into the apparatus by the Plaintiffs do not deviate from the principle of the invention, and are, in fact, material improvements. Moreover, under the terms of the license the Plaintiffs were not bound to adhere strictly to the Defendant's drawings. As to the royalty, we submit we were justified in what we did ; but we are quite willing to pay what is due.

Neville, Q.C., and *Rudall*, for the Defendant :—

A mere license, whether by parol or under seal, if not coupled with an interest, is revocable at any time : *Wood* v. *Leadbitter* (1). But, assuming this was a license coupled with an interest, and as such, not revocable at will, yet it is liable to forfeiture, and determinable if the conditions on which it is granted are broken. Here the licensees have not paid the royalty, and have not sufficiently advertised the invention ; they have also materially deviated from the Defendant's drawings. There is no direct authority on the point ; but in *Ward* v. *Livesey* (2), which was decided in the Lancaster Palatine Court, it was held that a license under seal was forfeited on breach of the terms on which it was granted, and that a letter was a sufficient indication of the intention of the patentee to take advantage of the forfeiture and that an instrument under seal was not necessary to determine the license.

[ROMER, J. :—How can I say that this license is revocable when a lump sum has been paid down for the exclusive use of the patented invention ?]

We submit that in principle there is no difference between the two cases. An exclusive license is not equivalent to a grant of the patent : *Heap* v. *Hartley* (3). It would be very

(1) 13 M. & W. 838. (2) 5 Rep. Pat. Cas. 102.
(3) 42 Ch. D. 461.

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hard on a patentee if, when the licensee does not fulfil the terms of the license, he cannot put an end to it. His patent rights might be seriously injured and he would be without a remedy. Lastly, on our evidence the alleged improvements are not improvements, and the Defendant was justified in what he did.

ROMER, J.:—

There are several points which arise in this case. In the first place, I am satisfied that on the true construction of this license the Defendant had not the power to revoke it by reason of any breach of any of the Plaintiffs' covenants—certainly not a breach by reason of non-payment of the royalty on the precise date fixed by the license. I need scarcely point out that the Defendant was not without his remedy if there had been any breach by the Plaintiffs of their covenants. He would have had the usual remedy against the Plaintiffs for damages and for accounts. The next point I have to consider is as to the alterations which the Plaintiffs made in certain of the apparatus supplied by them. Now, no doubt the Plaintiffs in some of the apparatus they sold did depart in certain points from the precise details of the invention as shewn in the Defendant's drawings and specifications; but, on the evidence as a whole, I am satisfied that those alterations were only alterations in matters of detail, not affecting the principle of the invention. Beyond that, as a question of fact, I am satisfied on the evidence that the alterations were improvements, and were calculated to increase the efficiency of the apparatus, and that the use and advertisement of those alterations were calculated to increase the reputation and enhance the sales of the patented invention. I need scarcely say that on the construction of this license it is clear to my mind that the Plaintiffs were entitled to do that. They were not bound by the precise details of the drawings and the specifition. The wording of the license shews that. I refer to the use of the words "when and as the licensees shall think fit for their absolute benefit." Suppose, for example, that some person wanted one of the patented apparatus, but wanted it adapted to some peculiar circumstances which rendered it impossible to keep strictly to the drawings and specifications. Obviously, to my

mind, the Plaintiffs would have been entitled, paying the royalty, to have supplied the patented apparatus adapted to the particular circumstances of the case. In my opinion, therefore, the Defendant was not entitled to treat the sale of those apparatus by the Plaintiffs with the alterations in them as anything which entitled him to treat the license as at an end, or to attempt to revoke it. It follows that, of course, he had no right after that attempted revocation to represent that he was entitled to manufacture these apparatus without regard to the Plaintiffs' rights, or to represent that the Plaintiffs' rights under their license had ceased. An injunction in those respects must follow; and so far as the costs of the Plaintiffs' action are concerned, I think the Defendant must pay those costs. Then I come to the counter-claim. Undoubtedly there is royalty due to the Defendant from the Plaintiffs. I can well understand the annoyance of the Plaintiffs at the conduct of the Defendant as explaining why they thought they were entitled to retain the amount of royalty in their hands until the Defendant had ceased to represent, as he was doing, that the Plaintiffs' rights had come to an end. But legally the Plaintiffs were not entitled to keep back that royalty from the Defendant merely on the ground that he had acted improperly in the way I have stated. Accordingly, on the counter-claim I order the Plaintiffs to pay the Defendant the amount of royalty less an agreed deduction of £8 10*s*. Then I think that the costs of the counter-claim, so far as it is strictly limited to a claim to recover the royalty, ought to be paid by the Plaintiffs. The rest of the counter-claim fails, and must be dismissed with costs, and there will be a set-off of the costs which I have given under the judgment.

H. L. F.

The Defendant appealed. The appeal was heard on the 1st of August, 1894.

Rudall, for the Defendant:—

(1.) An exclusive license to use a patent, unless coupled with a grant, confers no interest or property in the patent, and does not differ from any other license: *Heap* v. *Hartley* (1). It is

(1) 42 Ch. D. 461.

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therefore revocable at the will of the licensor; and it is immaterial that the license, provided it is a mere license, is under seal, or that valuable consideration has been paid for it: *Wood* v. *Leadbitter* (1).

(2.) The continuance of the license is conditional upon the performance of the conditions in the deed; but the Plaintiffs have violated the conditions in two respects—in not paying the royalties at the proper time, and in deviating from the patent.

Haldane, Q.C., and *W. N. Lawson*, for the Plaintiffs:—

The intention of this document is that the licensees should have the exclusive benefit of the patent rights during the continuance of the patent. A right to use the patent during the whole term without interference from any one else implies that the license shall not be revocable at will. The patentee grants "as beneficial owner." That is not the form which would be used for a mere revocable license. This is in substance an assignment for value of the licensor's interest in the patent so long as it exists. It cannot be suggested that £150 would be paid down for a right which could be taken away at any moment. Upon that construction many of the provisions in the deed would be rendered nugatory. It has been held that a patentee cannot, after an agreement to grant a license, publish circulars interfering with the trade of the licensee: *Clark* v. *Adie* (2); and the same principle applies to the present case.

The decision in *Wood* v. *Leadbitter* turned to a large extent upon the nature of the license, which was a license to enter land, and it was considered that such a license ought not to be enlarged into a new kind of estate.

[They were stopped.]

Rudall, in reply:—

This deed cannot take effect as an assignment; therefore, in order to make it irrevocable, it must be a license coupled with an interest; but *Heap* v. *Hartley* (3) shews that that is not the effect of it.

(1) 13 M. & W. 838, 845, 855. (2) 21 W. R. 456; on appeal, 764.
(3) 42 Ch. D. 461.

LINDLEY, L.J.:—

The main question in this case is whether an exclusive license to work a patent granted by the deed of the 28th of February, 1891, can be revoked by the patentee who granted the license. There are some other points to which Mr. *Rudall* called our attention, to the effect that there had been some breaches of the stipulations which would justify revocation; but he has not satisfied us that the learned Judge was wrong in the view which he took, that there were no such breaches except the delay in payment of the royalties, and therefore I shall address myself entirely to the main question—whether this so-called license is a revocable license. [His Lordship referred to the deed, and continued:—]

What is the true effect of that document? To call it a mere revocable license appears to me to call it that which it clearly is not. A person who has a license is not bound to exercise it for any time, and the person who grants a license does not come under any obligations to the licensee except not to treat him as a trespasser if it is a license to go upon land, and not to take advantage of some condition or clause which he could take advantage of but for the license. But this document imposes very serious obligations and duties, both on the so-called licensees and on the so-called licensor, and it would be a strange construction of this document to hold that the grantor of this license could at any moment relieve himself from the obligation under which he has come, by giving notice to determine it.

I think it is plain, when you come to look at this document, that the true meaning of it is, that the patentee grants to the licensees the exclusive right to use this patent for the unexpired term of the patent, or any renewal thereof. That involves on his part an obligation not to use the patent himself, which is a most important matter. It involves on the part of the licensees the duty, in the terms of clause 2, of advertising and pushing the sale of the inventions, and using their best endeavours to further their success. Now, who ever heard of such obligations as those attached to what is called a mere license? The truth is, that this is a grant of a right to use the patent, coupled with obligations both on the grantor and on the grantees. I should hesitate

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before I called this a license coupled with an interest. That is an ambiguous expression, and, of course, before one uses it one would like to understand the meaning of it. Coupled with an interest in what? I do not know that there is any interest, as distinguished from the right which the licensees acquire under the license to do what it authorizes and to restrain the licensor from himself using the patent during the continuance of the license. Interest in this sense the licensees have, but they are not assignees of the patent. It was suggested that we might construe this instrument as amounting to an assignment of the patent; but the clause which shews that the right to sue for an infringement is in the patentee excludes that view. It is not, therefore, quite an assignment of the patent. There is not very much difference between this and an assignment; but that clause prevents us from holding that it is an assignment of the patent. But when we come to read the document, we find several clauses which are so inconsistent with the right to revoke, that we cannot hold that there is such a right to revoke, or, varying the language, it appears to me that on the face of this document there is an implied covenant not to revoke, and I get at that quite apart from any considerations arising upon the *Conveyancing Act*, for I do not think that this is a conveyance within the meaning of the *Conveyancing Act*. But it does not follow that the introduction of the words "as beneficial owner" is unimportant. Those words shew that the parties did not mean to treat this as a revocable license. That is not the form which would be used if it were intended to grant a mere license. I am happy to say that we are not driven by any of the cases to do that which would be a clear injustice and utterly unwarranted. I think that the judgment appealed from is right, and that this appeal must be dismissed with costs.

LOPES, L.J.:—

I am of the same opinion. I think that this is not a revocable license. The license, to so call it, is created by deed and for valuable consideration. That would not in itself prevent its being revocable; but it is a license for the residue of the term of the letters patent. There are in it mutual obligations imposed

on the licensees and the licensor — obligations to my mind absolutely inconsistent with this being a license revocable, as it is suggested, at pleasure. Looking at the document, and considering it as best I can, I come to the conclusion that it was obviously the intention of the parties that it should not be revocable, and that there is to be implied a covenant that the license is to continue during the residue of the term. Consider what would follow if Mr. *Rudall's* contention were successful. The licensor might put the £150 into his pocket, and the next day revoke the license, and still keep the money in his pocket. Sub-licenses may be granted by the licensees for a consideration. If the license were revoked all those sub-licenses would fall as well, and the licensor at his pleasure might get rid of all the obligations upon his licensees by this document. All these matters, to my mind, tend to shew that the true construction of this document is that it is not to be a revocable license.

DAVEY, L.J.:—

I am of the same opinion. It is impossible to read through this document from the beginning to the end and not form the impression that the parties intended by the language they have used that this license should not be one which was revocable at the will of the licensor. No doubt that would not go for much, if the parties have used language which in law we are bound to construe so as to have that effect; but when I read the details of this document rather more closely, I find obligations and cross-obligations by the licensor and by the licensees which, in my opinion, are utterly inconsistent with the idea that this license was to subsist only at the will of the licensor. I find, running through this document, an assumption, upon which the provisions of it are framed, that the license will subsist during the term for which it purports to be granted, or, to express myself more accurately, an implied covenant that the license shall not be revoked by the licensor. It is true that the covenants contained in this document are sometimes expressed to be "during the term of this license" as in the first covenant, and sometimes "during the continuance of this license"; but, in my opinion, those words ought to be construed as having the same meaning, and that

C. A. 1894 GUYOT v. THOMSON. Davey, L.J.

meaning, I think, is, "during the term for which this license purports to be granted," that is to say, during the life of the patent. I also think that the power for the licensees to determine the license on six months' notice is in Mr. *Haldane's* favour, because I think the existence of the express power to the licensees to determine the license on six calendar months' notice, and the absence of any provision as to determination by the licensor, afford a strong indication that the intention of the parties was that the licensees alone should have the power to determine the license, and that the licensor should not have such power. I am of opinion that the appeal should be dismissed.

Solicitors for Plaintiffs: *Stibbard, Gibson & Co.*
Solicitor for Defendant: *F. A. Rudall.*

H. C. J.

C. A. 1894 KEKEWICH, J. *June* 15, 16. C. A. *Aug.* 2.

In re PARKER. MORGAN *v.* HILL.

[1894 P. 1000.]

Principal and Surety—Contribution—Deed of Arrangement executed by Surety—Proof by co-Sureties as Assignees of the Principal Debt—Mercantile Law Amendment Act, 1856 (19 & 20 *Vict. c.* 97), *s.* 5.

When one of two co-sureties has paid the creditor the whole of the debt and taken an assignment of the securities, he is entitled, under sect. 5 of the *Mercantile Law Amendment Act*, 1856, to bring an action against his co-surety, or to prove against his estate, as the assignee of the creditor, for the full amount of the debt, although he can only actually recover the just proportion which, as between the sureties, the co-surety is liable to pay.

The decision of *Kekewich*, J., affirmed.

But, *quære* (per *Davey*, L.J.), whether the result would be the same if the surety claimed under his right to contribution, and not as assignee of the creditor.

Ex parte Stokes (1) followed.

ADJOURNED SUMMONS.

This was an application by the Plaintiffs *Mary Ann Morgan* and *John William Jewson*, claiming as creditors of *James Caley Parker*, for the determination of the question whether they were

(1) De G. 618.

entitled to be admitted as creditors under the provisions of a deed of arrangement dated the 18th of February, 1893, for the sum of £1827 11*s.* 9*d.* or some other and what sum.

It appeared that by an indenture of mortgage dated the 12th of March, 1892, and made between the *Norwich and Norfolk Investment Corporation, Limited,* of the first part, *James Caley Parker, R. Holmes, G. Yallup, Luther Fall,* and *R. H. Court* of the second part, and *S. Cozens-Hardy* and *F. Jewson* of the third part, Messrs. *Parker, Holmes, Yallup, Fall,* and *Court* became jointly and severally liable to *S. Cozens-Hardy* and *F. Jewson,* as sureties for the repayment of the sum of £1853 5*s.* advanced by *Cozens-Hardy* and *Jewson* to the corporation by way of mortgage, and it was thereby provided that although the parties thereto of the second part were as between the corporation and themselves sureties only, yet, as between them and *Cozens-Hardy* and *Jewson,* they were to be taken as principal debtors.

R. Holmes, one of the five co-sureties, became bankrupt, and nothing could be recovered from his estate. *Luther Fall,* another of the co-sureties, also became bankrupt, and only £10 4*s.* was recovered from his estate by the mortgagees in respect of the amount due to them, for which credit was duly given. The three other sureties, *Parker, Yallup,* and *Court,* were thus left to bear the liability in respect of the mortgage debt.

On the 18th of February, 1893, *Parker* executed a deed of arrangement whereby he assigned his estate to the Defendant *S. G. Hill* as trustee for the benefit of his creditors, and the deed contained a provision that after charges entitled to priority had been satisfied the residue of the estate should be divided by the trustee among the creditors rateably in proportion to the amounts of their respective debts.

The mortgagees sent in a claim to the trustee under the deed of arrangement for the total amount of the debt, interest, and costs due under the covenant; but there was no formal admission of the claim, and nothing was paid by the trustee in respect thereof. The mortgagors, the *Norwich and Norfolk Investment Corporation,* went into voluntary liquidation. The mortgagees applied to the remaining two sureties, *Yallup* and *Court,* for payment of the amount due under the mortgage.

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Court paid to the mortgagees the amount of the principal and interest due under the mortgage, and subsequently *Yallup* paid one half of this amount to *Court*.

By an indenture dated the 13th of April, 1894, the mortgagees, by direction of *Court* and *Yallup*, transferred the security and debt to the Plaintiffs, *Mary Ann Morgan* and *John William Jewson*, as trustees for *Court* and *Yallup*. The Plaintiffs then claimed against the Defendant, as trustee of the deed of arrangement, to be entitled to the benefit of the proof or claim of the mortgagees against *Parker's* estate for £1827 11*s*. 9*d*., as being the full amount of principal, interest, and costs properly payable under the mortgage deed, so that the Plaintiffs might have a dividend on the full amount, provided such dividend did not (as in fact it did not) exceed one-third of the total amount of proof, being the proportion which, as between the sureties, *Parker*, *Yallup*, and *Court*, *Parker* was liable to pay. It was contended by the Defendant *Hill*, the trustee, that the proof must be limited to one-third of the total amount due under the mortgage, and that a dividend was only payable on that one-third. It appeared that the mortgagees had claimed interest up to Christmas, 1893, instead of up to February, 1893, the date of the deed of assignment, and the amount of their claim was accordingly reduced to £1753 15*s*.

The summons came on for hearing before Mr. Justice *Kekewich* on the 15th of June, 1894.

Hadley, for the Plaintiffs, the trustees for the co-sureties:—

The two co-sureties, having paid off the original creditors, and taken, as they were entitled to do, an assignment of all their interest, have a right to prove against the estate of the third co-surety on the same footing as the original creditors, subject only to this, that the co-surety cannot be made to pay more than his proportion, namely, one-third. The case of *Ex parte Stokes* (1) is directly in point, and shews that if this had been a bankruptcy the principal creditors might have proved against *Parker's* estate for the full amount of the debt, and that if the dividend did not exceed 6*s*. 8*d*. in the pound *Parker's*

(1) De G. 618.

estate could have had no claim over against the other two sureties. The case mentioned has never been doubted, and is cited as an authority in all the text-books, including the last edition of *Robson* on Bankruptcy (1).

T. B. Napier, for the trustee of the deed of arrangement:—

Rules as to proof in bankruptcy have nothing to do with this case, which arises under an ordinary deed of arrangement containing a provision that creditors are to be paid rateably in proportion to their respective debts. The question then is, what is the debt due from *Parker* to the co-sureties? When one surety has paid the whole of the debt to the principal creditor, the debt which is owing to such surety by a co-surety is the proportion of the debt which that co-surety is bound to pay, and no more. In 1848, when *Ex parte Stokes* (2) was decided, the position of co-sureties *inter se* was not clearly defined or established; but it is now settled that as between co-sureties the amount of the debt is the proportion payable by the co-surety: *Ex parte Snowdon* (3); *Wolmershausen* v. *Gullick* (4); *In re Ennis* (5). The question being one of contribution, it is immaterial whether there has or has not been an assignment of the principal debt. Before the *Mercantile Law Amendment Act*, 1856, a surety who had paid a mortgage debt was not entitled to sue on the covenant in the mortgage; but sect. 5 of that Act puts a co-surety in the same position as a joint debtor, and entitles him, on paying the debt, to an assignment of the securities held by the creditor, but expressly provides that the co-debtor or co-surety shall not recover more than a just proportion from his co-debtor or co-surety, and the meaning of that enactment is that the co-surety is not to sue or recover judgment for more than the just proportion due to him (6). If it were otherwise, manifest unfair-

(1) 7th Ed. p. 309.
(2) De G. 618.
(3) 17 Ch. D. 44.
(4) [1893] 2 Ch. 514.
(5) [1893] 3 Ch. 238.
(6) Sect. 5 of the *Mercantile Law Amendment Act*, 1856 (19 & 20 Vict. c. 97), is as follows: "Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty, or other security which shall be held by the creditor in

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ness would arise. For if there were two sureties for (say) £1000, and one of them paid the whole debt, and the estate of the other paid a dividend of 10s. in the pound, the co-surety, proving for £1000, would be paid £500, being the whole amount due to him, while the other creditors would only receive one half of the respective amounts due to them.

KEKEWICH, J.:—

It seems to me that I ought to dismiss the idea of bankruptcy from my mind, and to consider this merely as a question about the right of action. Two out of three sureties pay the whole debt, and, having so done, they are entitled to stand in the shoes of the creditor whose whole debt they have paid. That would seem to be according to natural justice; but whether it be so or not, at all events it is strictly in accordance with the provisions of the *Mercantile Law Amendment Act*, 1856 (19 & 20 Vict. c. 97). A surety in such a case is to "stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor," in any action in order to obtain indemnification. What is the creditor's right? To sue for the whole debt. Why must the surety be restricted to suing for something less than that? I can see no reason in principle, and the statute certainly does not point to any. But Mr. *Napier* argues that the proviso in the statute that "no co-surety

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respect of such debt or duty, whether such judgment, specialty, or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and upon a proper indemnity, to use the name of the creditor, in any action or other proceeding, at law or in equity, in order to obtain from the principal debtor, or any co-surety, co-contractor, or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty, and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him: provided always, that no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable."

. . . shall be entitled to recover from any other co-surety . . . by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable," means that the surety shall not bring an action for more than that proportion. That is a warping of the language. The proviso is introduced as something to explain and detract from the full right of action for the whole debt, and says that, notwithstanding the right of the surety to stand in the place of the creditor, and therefore to sue for what was due to the creditor, he shall not recover, that is, in ordinary language, bring into his pocket by means of the judgment more than a just proportion. That would be an idle proviso if the former part of the section did not mean that he might sue for the whole debt. It says, in tolerably plain language, " Sue for the whole debt; but when you have got your judgment that shall only avail you to bring into your pocket what is due to you having regard to your relation to the co-surety." I think, therefore, that the co-sureties are entitled to prove for the whole amount of the debt assigned to them, subject only to the qualification I have mentioned.

C. C. M. D.

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From this decision the Defendant *Hill* appealed. The appeal was heard on the 2nd of August, 1894.

C. A.

T. B. Napier, for the Appellant, cited *Ex parte Snowdon* (1); *In re Ennis* (2); 19 & 20 Vict. c. 97, s. 5.

[DAVEY, L.J., referred to *Ex parte Rushforth* (3) and *Wright* v. *Morley* (4).]

Hadley, for the Plaintiffs, was not called upon.

LINDLEY, L.J.:—

If the question in this case had not been covered by a case decided in 1848, it would have been deserving of consideration now; but in the present state of the authorities I think we should

(1) 17 Ch. D. 44.
(2) [1893] 3 Ch. 238.
(3) 10 Ves. 409.
(4) 11 Ves. 12, 22.

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be disturbing a long-established rule if we were to allow the present appeal. There were three persons liable as sureties under the mortgage deed, and two of them paid off the whole debt and became entitled to a contribution of one-third of the original debt from their co-surety *Parker*. In February, 1893, *Parker* executed a deed assigning all his property to a trustee for his creditors. The mortgagees, the principal creditors, put in a claim against his estate, which was not disputed, although the amount was not adjusted, and no dividend has been paid on it. What are the rights of the two sureties against *Parker's* estate, which is being administered under the deed? They say they are entitled to the benefit of the proof of the creditors for the full amount of the debt, although they can only receive dividends to the amount of one-third of the whole debt. Is this right? The question turns on the construction of the 5th section of the *Mercantile Law Amendment Act*, 1856. [His Lordship read the section, and continued :—]

If the matter were *res nova* I might perhaps have thought it more consistent with principle to accede to Mr. *Napier's* contention, and to hold that as the sureties were only to recover one-third each of the debt, they were only entitled to prove for one-third. But since 1848 a different rule has prevailed. In *Ex parte Stokes* (1) Lord Justice *Knight Bruce* said: "The question then substantially is, whether, as between the estates of the two sureties, when (one of them having become bankrupt) the creditor has proved the debt under the fiat, and has afterwards been paid in full, partly by the principal debtor, and partly by the surety, not a bankrupt,—the latter has a right to use the proof for the purpose of obtaining from the bankrupt's estate that amount of contribution to which the bankrupt is, or but for the bankruptcy would have been liable, so far as the proof can furnish means for that end; and I think that he has." That judgment has been acted upon ever since. I think, therefore, that the order appealed from is right, and that the sureties are entitled to prove for the whole debt, but can only recover dividends out of the estate to the amount to which *Parker* is liable to them.

(1) De G. 618, 621.

LOPES, L.J. :—

I am of the same opinion. I think the case is covered by authority, and that the order appealed from is right.

DAVEY, L.J. :—

I also agree. In 1805 Lord *Eldon* said, in *Ex parte Rushforth* (1): "It is clear, where a person has a demand upon a bill or bond against several persons, and no part of that demand has been paid before the bankruptcy by any of them, he may prove against each; and the circumstance, that one is a surety, the other the principal, or a co-surety, as between themselves, does not give a right to stop the holder, receiving dividends, until he has received 20 shillings in the pound." Since that time it has been established that it is the undoubted right of the creditor to prove for the whole debt against the estate of the surety. Here the creditors did prove against the estate of one of the sureties for the full amount of the debt. The other two sureties paid off the whole debt, and they were therefore entitled to all the remedies which the creditors would have had for the recovery of the debt. They therefore can prove for the whole debt against their co-surety's estate, but can only recover so much as will recoup themselves what they have paid beyond their proper share. This they have done, and I think it is in accordance with sect. 5 of the *Mercantile Law Amendment Act*, 1856, as well as with the practice in bankruptcy.

What would have been the effect if the creditors had not proved their claim against *Parker's* estate, and if the two sureties had brought in their claim in their own right against their co-surety for contribution, I do not say. That might have made a difference; but that is not the present case.

Solicitors: *Oldman, Clabburn & Co.*, agents for *Havers, Norwich*; *Sharpe, Parker, Pritchards & Barham*, agents for *Miller, Stevens, & Son, Norwich.*

(1) 10 Ves. 409, 416.

M. W.

C. A.
1894
Aug. 2.

NUTTER *v.* HOLLAND.

[1894 N. 12.]

Practice—Order for Payment into Court—Money not in the hands of Trustees —Rules of Supreme Court, 1883, *Order* LV., *r.* 3 (*d*).

Money will not be ordered to be paid into Court by executors, administrators, or trustees under Order LV., rule 3 (*d*), unless it is actually in their hands. It is not sufficient that it has been in their hands, and that they are responsible for it.

Re Chapman (1) disapproved.

THIS was an appeal from an order of Mr. *W. F. Robinson*, Q.C., Vice-Chancellor of the Palatine Court of *Lancaster*.

The Plaintiff *J. P. Nutter*, and the Defendant, *W. T. Holland*, were the executors and trustees of the will of *Alice Nutter*, who died on the 1st of March, 1886. The Defendant was a solicitor, and his firm got in the testatrix's estate and rendered an account to the beneficiaries, in which it appeared that the Defendant had received and was responsible for £809.

The Plaintiff *Nutter*, who was a beneficiary under the will, and some others of the beneficiaries, applied by an originating motion, under Order XLVIII., rule 3 (*d*) of the Palatine Court, which answers to Order LV., rule 3 (*d*) of the Rules of the Supreme Court, asking that the Defendant should pay into Court the sum of £809, which he admitted to have received. The Defendant filed an affidavit stating that he had invested or otherwise properly disposed of the sum claimed. The Vice-Chancellor refused to make the order, and the Plaintiffs appealed.

Hopkinson, Q.C., and *Mansfield*, for the Appellants:—

The rule under which we apply was intended to apply to such a case as this. It would be a very narrow construction to read it as applicable only to money actually in the hands of a trustee or executor. The Defendant admits that he has received the money, and he has not sufficiently discharged himself from his liability for it. The story that he tells of its investment is not to

(1) 54 L. T. (N.S.) 13.

be believed, and the money ought to be secured by being paid into Court: *Re Chapman* (1); *Hollis* v. *Burton* (2).

[LINDLEY, L.J.:—Can the Court consider such a case as this, where the facts are in dispute, upon an originating summons or motion? You ought to have taken out a summons under Order LV., rule 4 (*c*), or the corresponding rule of the Palatine Court, for taking the accounts.]

We do not desire any further account. We are satisfied with the account of 1886, and base our motion upon it. In such a case much expense and time is saved by taking the course which we have done.

Cozens-Hardy, Q.C., and *Whinney*, for the Defendant:—

The motion is altogether irregular. In the first place, the rule is only applicable to money actually in the hands of a trustee or executor. In the second place, an originating summons or motion is not the proper proceeding where there is a contest about the facts: *Dowse* v. *Gorton* (3); *In re Weall* (4); *In re Warren* (5). The Defendant has a good defence, having invested or otherwise properly disposed of the money; but he claims to have the accounts taken in the usual way, and to have an opportunity of adding evidence.

Mansfield, in reply.

LINDLEY, L.J.:—

If the Defendant asks for an account to be taken of the trust estate at his risk, all costs being reserved, the Court would probably accede to the request.

Whinney agreed to that course.

LINDLEY, L.J.:—

We think that the right course to be pursued will be to refer the matter back to the Vice-Chancellor to take the account of

(1) 54 L. T. (N.S.) 13.
(2) [1892] 3 Ch. 226.
(3) [1891] A. C. 190, 202.
(4) 37 W. R. 779.
(5) W. N. (1884) 112.

C. A. 1894 NUTTER v. HOLLAND. Lindley, L.J.

the trust estate, it being understood that this is done at the Defendant's request and at his risk, the costs being reserved.

The Plaintiffs' application cannot succeed. The notice of motion, which is in the nature of an originating summons, asks that the Defendant may be ordered to pay into Court the sum of £809, or that such order may be made as might seem just. That proceeds on the assumption that the sum is in his hands, and is based on the Rule of the Palatine Court which is in the same form as Order LV. of the Supreme Court, rule 3 (*d*). I think that rule means what it says. It applies only to money actually in the hands of the trustee, executor, or administrator, and if it is not in his hands, although he is responsible for it and ought to have it, that rule does not apply. I think Lord Justice *Kay* went too far in *Re Chapman* (1). The Vice-Chancellor was right in not making the order asked for; but I think he might have made such an order as we propose to make. Our order will be for the administration of the trust under Order LV., rule 4 (*c*); and the costs of the motion and the appeal will be dealt with by the Vice-Chancellor. If Mr. *Mansfield's* view is correct, and the defence proves to be groundless, the Defendant will have to pay the costs.

LOPES, L.J.:—

I am of the same opinion. I think the order proposed by Lord Justice *Lindley* is the proper way of dealing with the case. Though I have not much belief in the story told by the Defendant, it is clear that there are facts in dispute, and if so, this procedure is not the proper way to deal with the matter. I agree with what Lord Justice *Lindley* said in *In re Powers* (2): "A summons is not the proper way of trying a disputed debt where the dispute turns on questions of fact." The only other question is as to the proper construction of Order LV., rule 3 (*d*), and I agree that the rule means what it says, and that it is confined to money which is actually in the hands of executors, administrators, or trustees. In *Re Chapman*, Lord Justice *Kay* seems to have thought that an order might be made under the rule where money had been improperly applied by the

(1) 54 L. T. (N.S.) 13. (2) 30 Ch. D. 291, 296.

trustees of a will. I think that is a construction which the rule will not bear, and that the learned Judge went too far in that case.

DAVEY, L.J.:—

I agree. The case turns on the true construction of Order LV., rule 3 (*d*), which is the same as the corresponding rule of the Palatine Court under which the order appealed from was made. I agree that the rule means what it says, and that before an order is made under it for payment into Court it must be shewn that the trustee has money belonging to the trust actually in his hands. It does not apply to money which may or may not be found due from him on the result of an investigation.

I also agree that this application is wrong in form. It should have asked for the administration of the trust, and then, if an account is waived by the Plaintiffs, the Court might proceed to do what it would do in an ordinary case after the accounts have been taken, namely, to direct payment by the Defendant of the balance found due on the accounts. But I think the Defendant should be put in the same position as if the Plaintiffs had proceeded in that way. The motion asks for such further order as may seem just, and that will enable us to make such order as the case may require. The Plaintiffs are not only willing, but desirous, to waive any further account, and are content to charge the Defendant on the footing of the account which he has already rendered; but that the Defendant is not willing to agree to, but asks that an account may be taken of the trust estate. He is entitled to it if he asks for it. It is said that there is no account to take; but it is clear that there is a dispute between the parties. I agree that the account must be taken at the request and at the risk of the Defendant. It must be taken upon the footing of the account rendered in 1886. If he can shew that the cash in hand on that account is represented by investments, he can do so.

Solicitors: *James Craven, Preston; F. A. K. Doyle,* agent for *R. J. N. Parker, Blackburn.*

M. W.

C. A.
1894
July 30;
Aug. 6.

In re BROWNE.

Practice—Lunacy—Mental Infirmity—"Lunatic"—Stockholder—Dividends—Order—Receiver—Jurisdiction—Bank of England—Indemnity—Transfer into Court—Title of Order—Lunacy Act, 1890 (53 & 54 *Vict. c.* 5), *ss.* 108, 116, 146, 333—*Lunacy Act*, 1891 (54 & 55 *Vict. c.* 65), *s.* 27, *sub-s.* 4—*Rules in Lunacy*, 1892.

Under sect. 116 of the *Lunacy Act*, 1890, the Judge or Master in Lunacy has jurisdiction to make an order appointing a receiver of dividends on stock standing in the *Bank of England* in the name of a person who is, "through mental infirmity arising from disease or age, incapable of managing his affairs"; and, under sects. 133 and 146, the Bank may safely act on such order: but, as it is unusual to appoint a receiver of dividends on *Bank of England* stock standing in the name of another person, the better course in such cases, in the absence of any special reason to the contrary, is to bring the stock into Court.

Such an order should not be intituled "In Lunacy": Form 1 (*e*), Schedule to Rules in Lunacy, 1892.

BY an order made on the 24th of May, 1894, by Mr. *Bulwer*, Q.C., one of the Masters in Lunacy, under sect. 116 of the *Lunacy Act*, 1890 (1), and intituled "In the matter of *Frances Browne*, spinster, and In the matter of the Acts 53 Vict. c. 5, and 54 & 55 Vict. c. 65," the order being made upon the application of Miss *Mary Anne Browne*, one of the next of kin of the said *Frances Browne*, who was a lady eighty-four years of age, and very infirm; and upon the undertaking of *Mary Anne Browne*, to

(1) The material portion of sect. 116 of the *Lunacy Act*, 1890—being the first of a group of sections headed "Management and Administration," in Part IV. of the Act—is as follows:—

"116—(1.) The powers and provisions of this part of this Act relating to management and administration apply:—

". . . . (*d.*) To every person . . . . with regard to whom it is proved to the satisfaction of the Judge in Lunacy that such person is through mental infirmity arising from disease or age incapable of managing his affairs. . . .

"(2.) In the case of any of the above-mentioned persons not being lunatics so found by inquisition, such of the powers of this Act as are made exercisable by the committee of the estate under order of the Judge shall be exercised by such person in such manner and with or without security as the Judge may direct, and any such order may confer upon the person therein named authority to do any specified act, or exercise any specified power, or may confer a general authority to exercise on behalf of the lunatic, until further order, all or any of such powers without further application to the Judge. . . ."

(amongst other things) apply all moneys she might receive belonging to the said *Frances Browne* or her estate, and all moneys which she might receive on her account, in such manner as the Master should direct, and to account for such moneys when required, and to give security accordingly: "And it having been established to my satisfaction that the said *Frances Browne* is a person who through mental infirmity arising from age is incapable of managing her affairs, I do order that upon the certificate of the said Master that she has completed her security the said *Mary Anne Browne* be and hereby is authorized, on behalf of the said *Frances Browne*, to receive and give a discharge for the dividends accrued and to accrue upon the under-mentioned securities standing in the name of the said *Frances Browne*"; then followed a list of securities, including two *Bank of England* securities, consisting of *New South Wales* and *Queensland* inscribed stocks, therein stated to be standing in the name of the said *Frances Browne* in the books of the *Bank of England*.

The solicitors to the Bank then wrote a letter to the chief accountant, advising him not to act on this order on two grounds, first, that as the order had been made under sect. 116 of the *Lunacy Act*, 1890, it should have been intituled "In Lunacy"; and secondly, that the Master had no jurisdiction to make the order in the form in which it stood, inasmuch as, under the Act of 1890, *Mary Anne Browne* had only such powers as were exercisable by the committee of a lunatic's estate, and that there was no provision in the Act enabling such a committee to draw dividends on stock remaining in the lunatic's name. A copy of the letter was furnished to the Master, and was sent on by him to Lord Justice *Kay*, who returned it to the Master with a note that the matter was to be brought before the Court for argument.

The case now came before the Lords Justices accordingly, upon the application of *Mary Anne Browne*.

The case was opened by

Latham, Q.C., for the Bank:—

First, the title to the order is wrong, for it should have been intituled "In Lunacy," to shew the jurisdiction. Secondly, there

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is no jurisdiction to make such an order as this. The powers of the Master in a case such as the present, falling under sect. 116 of the *Lunacy Act*, 1890, do not include all the powers in Part IV., but are confined to the "powers and provisions" contained in the group of sections in Part IV. headed "Management and Administration," and these powers and provisions are enumerated in sect. 120, where a power to appoint a person to receive dividends is not included. From the language of sect. 27 of the *Lunacy Act*, 1891, it would seem that a distinction is made between the provisions applicable to lunatics and those applicable to persons coming under sect. 116, sub-sect. 1 (*d*). An order to receive dividends can only be made under the vesting order clause, sect. 133; but that section forms part of a different group of sections from those relating to "management and administration," and it is contrary to the practice of the Bank to separate the dividends from the stock: they should be paid only to the person in whose name the stock is vested. The Bank would not be protected by sect. 146, for it would not be paying the dividends "in pursuance of the Act," nor by sect. 333, which deals with "lunatics" only. The Act must be closely followed: *In re Noyce* (1).

Swinfen Eady, Q.C., and *Sebastian*, for *Mary Anne Browne*:—

As to the title of the order, it is in accordance with Form 1 (*e*), in the Schedule to the Rules in Lunacy, 1892. Upon the question of jurisdiction, if the Bank's construction of sect. 116 is correct, a committee could not perform the most trifling act without coming to the Judge. Sect. 120 is confined to the larger matters relating to "management and administration," but does not affect the smaller matters of ordinary everyday management, such as receiving dividends and getting in book debts. The jurisdiction given by sect. 108 is in the widest terms, and includes all orders relating to a statutory lunatic; and sect. 116 is sufficient to cover, not only the specified powers under sect. 120, but all general powers that can be exercised by a committee without the sanction of the Judge. The Act does not cut down the general powers given by the *Lunacy Acts*

(1) [1892] 1 Q. B. 642.

Amendment Act, 1889, ss. 41 and 52. It is a fallacy to suggest that the committee of a lunatic has no authority to receive dividends on stock standing in the name of the lunatic, and cannot be authorized to receive them without the stock being vested in him. It has been decided that a committee may be appointed to receive dividends, leaving the stock in the name of the lunatic: *In re Stark* (1); *In re Morgan* (2).

[*Latham*, Q.C.:—Those decisions relate only to back dividends.]

But the point of the decisions is that the dividends were ordered to be paid to the committee, although the stock remained in the name of the lunatic. Accordingly, there is jurisdiction in the Court to order a committee to receive dividends, whether past or future. The Bank is fully protected by sect. 333, which includes the property of all persons who may be treated as lunatic under sect. 116.

Latham, in reply:—

If this order is made under the vesting orders clause, sect. 133, it ought to have been on petition: Rules in Lunacy, 1892, r. 17.

1894. Aug. 6. LINDLEY, L.J.:—

In this case an order has been made by a Master in Lunacy under sect. 116 of the *Lunacy Act*, 1890; but, on presenting it to the *Bank of England*, the Bank officials have raised objections to it, and have declined to act upon it without the directions of the Court. The order runs thus: [His Lordship read it, and continued:—]

The first objection taken was to the title of the order. But the order is in the form given in the Schedule to the Rules in Lunacy, 1892 (see Form 1 (*e*)); and those forms were carefully settled. In cases of this description it is not thought desirable to head the forms of orders "In Lunacy," so as to publish more than is necessary the fact that the person named in the title is in the unfortunate condition in which such person really is. This

(1) 2 Mac. & G. 174, 176. (2) 1 H. & T. 212.

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objection is untenable, and very properly was not seriously insisted upon.

The next objection was that there was no jurisdiction to make the order. This is, of course, an important matter.

The general jurisdiction of a Judge in Lunacy is conferred by sect. 108 of the *Lunacy Act*, 1890, and extends, *inter alia*, to the management of the estates of lunatics, and by sect. 341 "lunatic" includes a person of unsound mind. The general jurisdiction of Masters is conferred by sect. 111, and by rule 10 of the Rules in Lunacy, 1892.

The Act is divided into parts. Part IV. is headed thus—"Judicial powers over person and estate of lunatics," and is sub-divided into groups of sections; one group, commencing with sect. 116 and ending with sect. 130, is headed "Management and Administration." This group of sections, it will be observed, applies (1.) to lunatics so found by inquisition; (2.) to lunatics not so found; and (3.) to persons who are, through mental infirmity arising from disease or age, incapable of managing their affairs. Such persons may be lunatics in the common acceptation of the term, or they may not. They are on the border line; but, even if they are not insane enough to be found lunatic by inquisition, they may for many purposes be treated as lunatic, though not so found by inquisition. This is plain from the language of sect. 116 of the *Lunacy Act*, 1890, and sect. 27, sub-sect. 4, of the *Lunacy Act*, 1891, and of rule 56 of the Rules in Lunacy, 1892.

The power of a Judge in Lunacy to appoint a receiver of the property of a person subject to his jurisdiction under the Act is conferred generally by sects. 108 and 116 of the *Lunacy Act*, 1890, and rule 83 of the Rules in Lunacy, 1892. Rule 83 expressly says—"A receiver may be appointed in any case, in which such appointment shall be deemed expedient." Certain specific powers are authorized to be conferred on committees by sect. 117 and subsequent sections of the *Lunacy Act*, 1890; and sect. 120, which does not mention the appointment of a receiver, does not, by implication or otherwise, negative the power of the Judge to appoint a receiver under the general authority to which I have alluded.

The power to appoint a receiver is clearly a power relating to "management and administration," and, although not specially mentioned in the group of sections so headed, is within the general words with which sect. 116 commences. This being so, the power can be exercised by a Master, and it need not be exercised by a Judge in person. Soon after the Rules in Lunacy, 1892, had been made, a question arose whether a Master had jurisdiction to make a vesting order under sects. 133 *et seq.* of the *Lunacy Act*, 1890; and, after carefully examining the Acts and Rules, all the members of the Court of Appeal came to the conclusion that he could, and such orders have ever since been made accordingly. Sect. 133 and rule 54 authorize orders for transfer into Court and vesting orders in cases to which sect. 116 applies.

The jurisdiction to make the order being clear, it is also clear that the *Bank of England* may safely act upon it. Sect. 146 alone is enough to protect the Bank. Sect. 333 is still more explicit, and, although the expression there is "so far as relates to any property in which a lunatic is interested," that expression clearly, in my judgment, includes all persons who, whether lunatic or not, are subject to the jurisdiction conferred on the Judges in lunacy, and can be treated as if they were lunatic under sect. 116 of the *Lunacy Act*, 1890.

The practice of appointing a receiver of the dividends of Government and other securities, without ordering a transfer of them into the name of the receiver, is not, however, usual in Chancery, nor has it been usual in Lunacy. The practice has been to order the stocks, &c., to be transferred into Court, and then to let the receiver obtain the dividends from the Paymaster-General. A settled practice like this ought not to be departed from without sufficient reason, and, in general, it ought to be adhered to. Nor is there any reason for not adhering to it in this case. The order, therefore, will be remitted to the Master for alteration accordingly.

I have no doubt, however, of the jurisdiction of the Master to make an order in the form adopted in this case, nor of the safety of the Bank in acting upon it; and, if hereafter an order in this form should be deliberately made for any special reason, the Bank ought to act upon it and pay the dividends to the

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receiver, treating him as an agent duly appointed to receive dividends only. In cases of shares, &c., in companies, a transfer into Court might be inexpedient, if not impossible, and yet a receiver of the dividends might be highly desirable.

LOPES, L.J.:—

There are three classes of persons mentioned in sect. 116: (1.) lunatics so found by inquisition; (2.) lunatics not so found; (3.) persons who, through mental infirmity arising from disease or age, are incapable of managing their affairs.

Having regard to the language of sect. 116 of the *Lunacy Act*, 1890, and sect. 27, sub-sect. 4, of the *Lunacy Act*, 1891, and of rule 56 of the Rules in Lunacy, 1892, I am of opinion that it was the intention of the Legislature that the last-mentioned class, for the purposes of management and administration, were to be, in all respects, regarded and treated as lunatics. If this is correct, all difficulty is removed, and the same powers and the same jurisdiction in respect of management and administration exist in respect of the last class as exist in the case of the two former classes of persons, and the Bank is indemnified under sects. 146 and 333.

In my judgment, there is jurisdiction to appoint a receiver of the dividends alone, and, in some cases, that would be the proper course to adopt. But, in this particular case, I see no reason to depart from that which appears to have been the usual practice.

The objection to the title of the order cannot be supported. The title is in accordance with the form given in the Schedule to the Rules in Lunacy, 1892.

DAVEY, L.J.:—

The question in this case is whether the *Bank of England* is bound to act upon an order of Master *Bulwer*, appointing a receiver of the dividends on certain stocks standing in the name of Miss *Browne* in the books of the Bank. Mr. *Latham* first objected to the title of the order; but it appears to be in the form provided for such cases as the present in the Rules, and therefore no objection can be made to it.

Sect. 116, sub-sect. 1, of the *Lunacy Act*, 1890, enacts as follows:

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[His Lordship read the material portion of the section, and continued:—] Mr. *Latham* contends that the "powers and provisions" so made applicable are only those which are found in the group of sections under the heading "Management and Administration." In my opinion, this is wrong. I think that the Act means what it says, and that all powers and provisions relating to "management and administration" which are found in Part IV. of the Act, are included. Sect. 108, sub-sect. 2, enables the Judge in Lunacy to make orders for the custody of lunatics so found by inquisition, and the management of their estates. By the 83rd of the Rules made in pursuance of the Act, "A receiver may be appointed in any case, in which such appointment shall be deemed expedient." I agree that, if there was jurisdiction to make the order impeached, it might be made by the Master. And I am of opinion that, by the joint effect of sect. 108, sub-sect. 2, rule 83, and sect. 116, sub-sect. 1 (*d*), the order for a receiver in the present case could be made; and I also think that the Court can make a vesting order under sect. 133. Mr. *Latham* may be right, and I rather think he is right, in construing sect. 116, sub-sect. 2, with reference to sect. 120 as enabling the Judge to confer, in a case like the present, all or any of the powers in sect. 120 on a person to be named; but I think he is wrong in treating sect. 120 as exclusive. As I have already said, I think the Judge may make orders for the management of the estate of the *quasi* lunatic generally; and I think that sect. 116, sub-sect. 2, is not a limiting section, but is inserted *ex majori cautelâ*, to enable the Judge to confer the additional or special powers enumerated in sect. 120. But, says Mr. *Latham*, the Bank will not be indemnified in acting on the order, because sect. 333 confines the indemnity to any acts "so far as relates to any property in which a lunatic is interested," and the person in question in this case is not a lunatic; and he refers to sect. 27, sub-sect. 4, of the amending Act of 1891. In my opinion, the Bank will be amply protected by sect. 146; but I also think that sect. 333 applies to the case, and that a person within the description in sect. 116, sub-sect. 1 (*d*), is a lunatic for the purposes of that section.

Lastly, it was said that the order was wrong in appointing a

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receiver of the dividends only of stocks standing in the books of the *Bank of England* in the name of the person whose property the Court has taken under its protection. No statutory provision relating to the Bank, which prohibits or prevents such an order being made, was brought to our attention; and I am of opinion that the Court has jurisdiction, and I think it important that we should not allow any doubt to be entertained as to our jurisdiction, to appoint a receiver of dividends only. There may be many cases in which it would be highly desirable to adopt that course. The receiver is but the statutory or judicial agent, or attorney, to receive dividends due to the person in whose name the stocks are standing. But, as it appears to be unusual to appoint a receiver of dividends on stocks in the books of the *Bank of England*, and there is no sufficient reason in the present case why the stocks should not be brought into Court, it will, perhaps, be better to follow the usual practice, and direct the stocks to be transferred into the name of the Paymaster-General.

Solicitors: *Freshfields; Kingsford, Dorman, & Co.*

G. I. F. C.

C. A. 1894 *July* 9; *Aug.* 8.

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[1892 H. 1487.]

Copyright—Book—"Map, Chart, or Plan"—Pattern Sleeve—Subject-matter—Literary Merit—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *ss.* 1, 2.

The Plaintiff claimed copyright in a cardboard pattern sleeve containing upon it scales, figures, and descriptive words for adapting it to sleeves of any dimensions:—

Held (reversing the decision of *Wright*, J.), that it was not capable of copyright as a "map, chart, or plan" within sect. 2 of the *Copyright Act*, 1842 (5 & 6 Vict. c. 45):

But, *Semble*, it might be the subject of a patent as an instrument or tool.

APPEAL of Defendant from judgment of Mr. Justice *Wright* (1).

Bramwell Davis, for the Defendant, Appellant, repeated his argument in the Court below, and, in addition to the cases there

(1) [1893] 2 Ch. 377.

cited, namely, *Stannard* v. *Lee* (1), *Page* v. *Wisden* (2), *Cable* v. *Marks* (3), *Davis* v. *Comitti* (4), and *Schove* v. *Schmincke* (5), referred to *Maple & Co.* v. *Junior Army and Navy Stores* (6), *Kenrick & Co.* v. *Lawrence & Co.* (7), and *Hildesheimer & Co.* v. *Dunn* (8). He also submitted that the so-called sleeve chart in question was in reality an instrument or tool, and, if so, might possibly be a proper subject of a patent, but could not be a subject of copyright under the *Copyright Act*, 1842 (5 & 6 Vict. c. 45): *Philpott* v. *Hanbury* (9).

[LORD HERSCHELL, L.C., referred to *Drury* v. *Ewing* (10), cited in *Drone* on Copyright (11).]

Arthur J. Walter, for the Plaintiff:—

The protection given by the *Copyright Act* is not limited to works possessing literary merit, but extends to any product of brain work or mental effort: *Maple & Co.* v. *Junior Army and Navy Stores* (12); *Trade Auxiliary Company* v. *Middlesboro and District Tradesmen's Protection Association* (13). A picture is entitled to the protection of the Act just as much as a sheet or card of letterpress. This is, in substance, a picture-book, depicting by lines and curves, instead of describing in language, that which would convey information to the mind. In *Page* v. *Wisden* everything proposed to be registered was old. So in *Cable* v. *Marks*. In *Davis* v. *Comitti* the decision was based entirely on the facts. In *Schove* v. *Schmincke* the only thing proposed to be registered was the title, "*Castle Album*." *Grace* v. *Newman* (14) covers this case. That was a case of a cemetery catalogue of monumental designs; and it was held that the plaintiff was entitled to copyright, although there was scarcely any letterpress. The American case of *Drury* v. *Ewing*, where a dress chart or diagram was held entitled to copyright, is almost exactly analogous to the present, and may be

(1) Law Rep. 6 Ch. 346.
(2) 20 L. T. (N.S.) 435.
(3) 52 L. J. (Ch.) 107.
(4) 52 L. T. (N.S.) 539.
(5) 33 Ch. D. 546.
(6) 21 Ch. D. 369.
(7) 25 Q. B. D. 99.
(8) 64 L. T. (N.S.) 452.
(9) 2 Rep. Pat. Cas. 33, 153.
(10) 1 Bond (Amer.), 540.
(11) Page 143.
(12) 21 Ch. D. 369, 378.
(13) 40 Ch. D. 425, 435.
(14) Law Rep. 19 Eq. 623.

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followed in the English Courts: *Copinger* on Copyright (1). The form of injunction is indicated in *Cooper* v. *Whittingham* (2).

[LINDLEY, L.J.:—The common form is given in *Seton*. It follows the definition clause, sect. 15, of the Act.]

Bramwell Davis, in reply:—

This is not a picture giving information without anything further, and therefore does not come up to the decision in *Maple & Co.* v. *Junior Army and Navy Stores* (3). This is certainly not a "book," nor a "sheet of letterpress"; and it cannot be properly described as a "map, chart, or plan."

1894. Aug. 8. LORD HERSCHELL, L.C.:—

This action was brought by the Plaintiff as assignee under an assignment in writing of the 1st of February, 1891, from one *Edmund George Kendall*, "of the copyright in a book, to wit, a map, chart, or plan entitled the '*Cosmopolitan Sleeve Chart*, 1886.'" The copyright and assignment were both duly registered at *Stationers' Hall*. The Plaintiff alleged that the Defendant had infringed his copyright in the "*Cosmopolitan Sleeve Chart*" by the printing, publishing, and sale of a large number of sleeve charts called the "*Ideal*," such sleeve charts being copies of the Plaintiff's "*Cosmopolitan Sleeve Chart*." Mr. Justice *Wright*, before whom the action was tried, granted a perpetual injunction, restraining the Defendant from manufacturing or causing to be manufactured, printing, selling, offering for sale, or in any manner using or dealing with a sleeve chart called the "*Ideal*," or any other sleeve chart being a colourable or obvious imitation of the Plaintiff's registered copyright sleeve chart. From this judgment the Defendant has appealed, on the ground that the Plaintiff is not protected by the *Copyright Act*, the so-called sleeve chart not being a subject-matter in respect of which copyright protection can be obtained under that Act.

The words and figures for which the Plaintiff is alleged to have obtained such protection consist of the words "top curve line; under curve line; under arm curves; measure round the

(1) 3rd Ed. pp. 105, 106. (2) 15 Ch. D. 501.
(3) 21 Ch. D. 369

thick part of the arm; measure round the thick part of the elbow; measure round the knuckles of the hand;" together with certain curved lines in connection with the words "under arm curves" and certain scales of inches and half-inches in connection with the words "measure round the thick part of the arm," and "measure round the thick part of the elbow." All these are printed on a piece of cardboard, so curved as to represent the parts of the arm above and below the elbow, which is called the "*Cosmopolitan Sleeve Chart.*"

I cannot do better than take Mr. Justice *Wright's* account of the purpose intended to be served by the cardboard, with these words and scales upon it. After pointing out that, for the purpose of accurately measuring the inner part of a sleeve, so as to make it bear its due relation to the outer part, it was formerly necessary to make certain calculations—of a simple character indeed, but still leaving room for error—he said that the Plaintiff's so-called chart embodied a method of dispensing with any computation and any measurement beyond the simple measurement of the actual arm. This was accomplished by holes made in the cardboard opposite each half-inch of the scales, referring to the measurement round the thick part of the arm and of the elbow respectively, so that by means of these holes pencil marks might be made on a card or paper placed underneath the chart at the proper points in the scales of inches, and the required lines might thus be drawn. Mr. Justice *Wright* thought that the Plaintiff's pattern did not come within the words "book" or "letterpress." The only words that appeared to fit it at all were, in his opinion, "map, chart, or plan." He thought that a map, chart, or plan need not be topographical, and that what the Plaintiff had registered might be regarded either as a chart or plan of the female arm in relation to dressmaking, or as the plan of a pattern or model sleeve.

Now, I have to observe, in the first place, that no one could claim a monopoly of the use of such a sentence as "measure round the thick part of the arm," or of a half-inch scale. And the words and figures found on the "chart" do not in combination convey any intelligible idea, nor could they be of the slightest use to any one, apart from the cardboard upon which

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they are printed. The object of the *Copyright Act* was to prevent any one publishing a copy of the particular form of expression in which an author conveyed ideas or information to the world. These may be retained by any one, though the book, map, or chart which embodied them has passed out of his possession. If he were to commit to memory the contents of the book, or the information disclosed by the map or chart, he would be as much in possession of the author's ideas or information as if the book, map, or chart were physically in his hands. But this is not the case with the words or figures upon the sleeve chart. They are intended to be used, and can only be of use, in connection with that upon which they are inscribed. They are not merely directions for the use of the cardboard, which is in truth a measuring apparatus, but they are a part of that very apparatus itself, without which it cannot be used, and except in connection with which they are absolutely useless.

I think it is clear, therefore, that what the Plaintiff has sought to protect under the Act for the protection of literary productions is not a literary production, but an apparatus for the use of which certain words and figures must necessarily be inscribed upon it. It is quite true that, notwithstanding the words of the preamble, the protection of copyright may be obtained for works which cannot be said, in the ordinary sense of the term, to have literary merit. Compilations, such as the Post Office Directory, have, no doubt, properly been held to be the subject of copyright; but there is, as I have pointed out, a marked distinction between these and the claim of protection under the *Copyright Act* for words and figures inscribed on and necessarily forming part of an apparatus or tool. It is not necessary to determine whether such an apparatus as that now in question could be the subject of letters patent as an invention, though I am far from saying that it could not be so, if novel. One can conceive not a few kinds of apparatus clearly patentable, the use of which necessarily required as part thereof the inscription upon them of words or figures. If a patent were obtained, its duration would be limited to fourteen years; but, if the Plaintiff's contention in the present case were well-founded, the patentee would only have to register these words and figures

under the *Copyright Act* in order to obtain the much longer protection which is accorded to literary works.

These considerations satisfy me that the decision pronounced in favour of the Plaintiff cannot be supported. I think that the judgment should be reversed and the action dismissed, with costs.

LINDLEY, L.J.:—

This is an appeal by the Defendant from a decision of Mr. Justice *Wright*, granting an injunction restraining the Defendant from infringing the Plaintiff's copyright in a thing called the "*Cosmopolitan Sleeve Chart.*" The appeal raises two questions—viz., (1.) whether the thing is one in which copyright can be had; and, (2.) if it is, whether the Defendant has infringed it. The first question is one which, so far as I know, is quite new in this country, although it has arisen in *America*, and been decided there in the plaintiff's favour: see *Drury* v. *Ewing* (1). The thing in question consists of certain lines and figures printed on a piece of cardboard with the following words upon it: "Top curve line; under curve line; under arm curves; measure round the thick part of the arm; measure round the thick part of the elbow; measure round the knuckles of the hand."

The evidence shews that what is on the cardboard is not intended simply to be understood by persons who wish to learn how to cut out sleeves, but that the cardboard itself is intended for use in cutting them out. This at once distinguishes this particular thing from every publication which is generally understood to come under the definition of the word "book" in the Act 5 & 6 Vict. c. 45, s. 2—viz., "volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published." The learned Judge considered that this thing was a map, chart, or plan; but, if so, it is a very peculiar one, for the use of it lies, not in the information conveyed by it, but in such information combined with the material on which the information is printed. The thing is in truth a measuring instrument: it is no more a chart or plan within the *Copyright Act* than is a scaled ruler such as is found

(1) 1 Bond (Amer.), 540.

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in any mathematical instrument case. Such a thing may possibly, if novel and useful, be a good subject-matter for a patent. But I cannot bring myself to hold that it is a map, chart, or plan within the meaning of the *Copyright Act*.

In *Philpott* v. *Hanbury* (1) Mr. Justice *Grove* decided that a patent obtained by *Philpott* in 1882 for a similar thing was bad for want of novelty and for insufficiency of the specification. But he did not decide that such a thing as this, if new, could not be the subject-matter of a patent. A new and useful instrument for measuring would be patentable, but at the present day novelty would probably be difficult to establish.

I am not aware of any English authority which throws any real light on the applicability of the *Copyright Act* to such a thing as this. The American case to which I have referred arose on a motion to commit for a breach of an injunction, and although the learned Judge thought the case might come within the *American Copyright Act*, yet all he had to decide was whether the defendant had committed a breach of the injunction, and, this being proved, it was not necessary for him to decide more. There is no report of the case when heard in the first instance on the merits, and the case has been doubted in *America* by the Supreme Court in *Baker* v. *Selden* (2).

The character of what is published is the test of copyright. If what is published is not separately published, is not a publication complete in itself, but is only a direction on a tool or machine, to be understood and used with it, such direction cannot, in my opinion, be severed from the tool or machine of which it is really part, and cannot be monopolized by its inventor under the *Copyright Act*.

The register of the so-called copyright of the Plaintiff in this case runs thus: "Title of Book, the '*Cosmopolitan Sleeve Chart*,' 1886." When the real character of the thing is ascertained, it proves to be a measuring tool or instrument, to which, in my judgment, the *Copyright Act* has no application.

Under these circumstances it is unnecessary to consider the question of infringement. But here again the Plaintiff appears to me to fail. The Defendant may have got her own idea from

(1) 2 Rep. Pat. Cas. 33.

(2) 11 Otto, 99, 107.

the Plaintiff's chart, but the Defendant has not copied more than the Plaintiff's method of measuring. Copyright, however, does not extend to ideas, or schemes, or systems, or methods; it is confined to their expression; and if their expression is not copied the copyright is not infringed. The case of *Baker* v. *Selden* (1), already referred to, illustrates this very well. It was there held that the author of a system of book-keeping was not entitled to any monopoly in the system, but was only entitled to prevent other persons from copying his description of it.

This is an attempt to use the *Copyright Act* for a purpose to which it is not properly applicable, and the appeal must be allowed, with costs here and below.

DAVEY, L.J.:—

In this case the Plaintiff, as assignee of one *Edmund George Kendall*, claims copyright in what is described in the statement as "A book, to wit, a map, chart, or plan entitled the '*Cosmopolitan Sleeve Chart*, 1886.'" The question is whether the Plaintiff can have copyright in the thing so described. The Act 5 & 6 Vict. c. 45 gives copyright—*i.e.*, the right of multiplying copies—in books; and by sect. 2 it is enacted that "a 'book' shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published." I agree with the learned Judge below that a "map" is not confined to what is popularly known as a map—viz., a geographical map—and that a "chart" is not confined to what is popularly called a chart—viz., a map of a portion of the seas shewing the rocks, soundings, and suchlike information for the use of navigators. But I cannot agree with him that the cardboard before us is either a map, plan, or chart within the Act. There may, no doubt, be an anatomical or physiological plan, shewing the structure and distribution of the muscles and bones of the human arm, or any other part of the human frame, which would be protected by the *Copyright Act*. But this so-called chart does not seem to me to be of that character, or to be the proper subject of copyright. The preamble of the Act recites that it is expedient "to afford

(1) 11 Otto, 99.

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greater encouragement to the production of literary works of lasting benefit to the world": and although I agree that the clear enactment of a statute cannot be controlled by the preamble, yet I think that the preamble may be usefully referred to for the purpose of ascertaining the class of works it was intended to protect.

Now, a literary work is intended to afford either information and instruction, or pleasure, in the form of literary enjoyment. The sleeve chart before us gives no information or instruction. It does not add to the stock of human knowledge or give, and is not designed to give, any instruction by way of description or otherwise; and it certainly is not calculated to afford literary enjoyment or pleasure. It is a representation of the shape of a lady's arm, or more probably of a sleeve designed for a lady's arm, with certain scales for measurement upon it. It is intended, not for the purpose of giving information or pleasure, but for practical use in the art of dressmaking. It is, in fact, a mechanical contrivance, appliance or tool, for the better enabling a dressmaker to make her measurements for the purpose of cutting out the sleeve of a lady's dress, and is intended to be used for that purpose. In my opinion it is no more entitled to copyright as a literary work than the scale attached to the barometer in *Davis* v. *Comitti* (1). The Plaintiff is really seeking a monopoly of her mode of measuring for sleeves of dresses under the guise of a claim to literary copyright. The fallacy of the learned counsel's argument seems to me to lie in a failure to distinguish between literary copyright and the right to patent an invention. No doubt one may have copyright in the description of an art; but, having described it, you give it to the public for their use; and there is a clear distinction between the book which describes it, and the art or mechanical device which is described. I agree with what is said in an American case of *Baker* v. *Selden* (2): "Where the art cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works

(1) 52 L. T. (N.S.) 539. (2) 11 Otto, 103.

explanatory of the art, but for the purpose of practical application." In that case it was held that a man could not have copyright in the model pages of an account book contained in a work explaining a peculiar system of book-keeping. I know not whether this mode of cutting out sleeves could or could not have been patented; but of this I am sure, that the Plaintiff, if she wished to protect it, should have had recourse to the patent law, and not to the law of copyright. I have said nothing on the question whether the Defendant's chart is an infringement of the Plaintiff's; and it is not necessary, in the view which I take of the case, to do so; but I do not disagree with what has been said by Lord Justice *Lindley*.

I am of opinion the appeal should be allowed, and the action dismissed with costs.

Solicitor for Appellant: *H. S. Holt.*
Solicitors for Respondent: *Firth & Co.*

G. I. F. C.

In re TUCKER. TUCKER *v.* TUCKER.

[1893 T. 168.]

Statute of Limitations—Partnership—Liability of Retired Member of Firm—Payment of Interest by Continuing Members—Mercantile Law Amendment Act, 1856 (19 & 20 *Vict. c.* 97), *s.* 14.

W. T., a member of a firm, was jointly and severally liable in a sum of money deposited with the firm by the trustees of a will. In 1883 *W. T.* retired from the firm, and a deed of dissolution was executed by which it was agreed that *W. T.'s* retirement should not be made known for a year, and then that it should be optional whether it should be gazetted; that the continuing partners should take and collect all the assets and should pay all the debts and liabilities, and should indemnify *W. T.* against them, and should pay him a certain sum by instalments; and that so long as any money remained due to him he should have power on giving notice to collect the debts due to the firm and to re-enter on the premises and carry on the business himself. *W. T.'s* retirement was never gazetted, and the business was carried on in the old name of the firm. Down to 1891 interest was regularly paid to the testator's estate on the loan by cheques drawn in the name of the firm:—

Held, in a suit by the beneficiaries under the will, that, as against *W. T.*

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the debt was not barred by the *Statute of Limitations*, notwithstanding the 14th section of the *Mercantile Law Amendment Act*; for that, considering the terms of the deed of dissolution and the fact that the retirement of *W. T.* was kept secret, the payment of interest, after his retirement, by the continuing partners, must be taken to have been made by them on his behalf and as his agents.

Watson v. *Woodman* (1) distinguished.

The decision of *Romer*, J., affirmed.

THIS was an appeal from a judgment of Mr. Justice *Romer* (2).

The facts were shortly as follows:—

Stephen Tucker, by his will dated the 18th of March, 1870, after appointing *M. Howitt* and *J. Kayess* his trustees and executors, empowered and directed his trustees or trustee for the time being to invest his personal estate either by placing the same on deposit in the hands of the firm of *Baker, Tuckers & Co.*, should they be willing to receive it at interest, or if not, to invest the said trust moneys upon the securities therein mentioned. And the testator directed his trustees to stand possessed of the said trust funds upon trust for his wife, the Plaintiff *Mary Tucker*, for her life, and after her death upon trust for his children and their issue, as therein mentioned.

S. Tucker died in April, 1870. At the date of his will he had on deposit with the firm of *Baker, Tuckers & Co.* the sum of £7485 10*s.* 3*d.* After his death his trustees, *M. Howitt* and *Kayess*, continued the loan to the firm, and subsequently increased it to £8633, which sum represented the residuary estate of the testator, and was always credited in the books of the firm to "the trustees of *Stephen Tucker*."

At the date of the will and of the death of the testator the firm of *Baker, Tuckers & Co.* consisted of *H. Tucker* and the Defendant *W. Tucker*. *H. Tucker* died in 1875, and the Defendants *W. Tucker*, *A. J. Tucker*, and *G. H. Deane* were the present trustees of his will. *W. Tucker* afterwards admitted *H. E. Tucker* and *S. B. Tucker* into partnership with him in the said business. In December, 1878, *H. E. Tucker* retired, and *A. J. Tucker* became a partner with *W. Tucker* and *S. B. Tucker* in his place.

In July, 1881, *M. Howitt* and *J. Kayess* retired from the trusts of *S. Tucker's* will, and *S. B. Tucker* and *C. Cannon* were appointed

(1) Law Rep. 20 Eq. 721. (2) [1894] 1 Ch. 724.

trustees in their place. *Howitt* and *Cannon* both subsequently became bankrupt.

In April, 1883, the Defendant *W. Tucker* retired from the partnership, and by an agreement dated the 13th of April, 1883, the partnership was dissolved as to *W. Tucker* as from the 31st of December, 1882; but it was agreed that no notice of the dissolution should be given till the 1st of February, 1884, and after that date it should be left to the option of any of the parties whether it should be advertised. It was also agreed that the debts or assets of the firm should be taken over by the continuing partners, *A. J. Tucker* and *S. B. Tucker*, and that they would pay and discharge all the debts and liabilities of the late partnership, and should jointly and severally indemnify *W. Tucker* and his estate and effects therefrom, and also that they should pay him a sum of money therein mentioned by instalments, the last of which would fall due in December, 1884; and it was provided that so long as any money was owing by the continuing partners to the retiring partner a monthly balance-sheet should be delivered to the retiring partner, and he might at any time, on leaving notice at the counting-house of the partnership, call in the whole amount of the debt owing to him, and might collect all book debts and enter on the premises and carry on the business on his own account.

The retirement of *W. Tucker* was not in fact advertised in the *London Gazette*, and the business continued to be carried on in the old name of *Baker, Tuckers & Co.*

J. Kayess died in April, 1884, and the Defendants, *W. Tucker* and *S. B. Tucker*, were the executors of his will.

In 1891 the Defendants, *W. Tucker*, *S. B. Tucker*, and *A. J. Tucker*, turned the business into a limited liability company under the name of *Baker, Tuckers & Co., Limited.* From the death of the testator *Stephen Tucker* until the 30th of June, 1891, interest was regularly paid to the Plaintiff *Mary Tucker*, when it ceased. These payments were always made by cheques drawn in the firm name of *Baker, Tuckers & Co.*

This action was commenced in January, 1893, by *Mary Tucker* and some other beneficiaries under the will of *S. Tucker*, claiming, (1.) administration of the trusts of the will and accounts on the

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footing of wilful default against *S. B. Tucker*, *C. Cannon*, and *J. Kayess*, deceased; (2.) a declaration that *W. Tucker* was constructively a trustee of the £8633 for the benefit of the Plaintiffs; and (3.) that the Defendants, *W. Tucker*, *S. B. Tucker*, and *C. Cannon*, and the executors of *H. Tucker* and *J. Kayess*, deceased, were jointly and severally liable to replace the £8633 with interest.

At the trial of the action Mr. Justice *Romer* held that the Plaintiffs' claim against the estate of *H. Tucker* was barred by the *Statute of Limitations*, but that as against *W. Tucker* the claim was not barred, for that under the circumstances the payment of interest after his retirement in 1883 by the continuing partners must be taken to have been made by them on his behalf and as his agents. He also held that it was a breach of trust in the trustees of *S. Tucker's* will to continue the loan to the surviving partners after the firm was dissolved by the death of *H. Tucker* in 1875; and he directed an inquiry, as against the executors of *J. Kayess*, whether any and what loss had accrued to the trust estate by his neglect to get in the debt from *H. Tucker's* estate or from *W. Tucker*; and a similar inquiry against *S. B. Tucker* as to his neglect, after he was appointed trustee, in not getting in the debt from *W. Tucker*; but directed that these inquiries should not be proceeded with without the leave of the Court.

From this judgment appeals were brought by the executors and beneficiaries under the will of *J. Kayess*, and also by the Defendant *W. Tucker*.

In consequence of the view taken by the Court, that it was premature to dispose of the first appeal, it is unnecessary at present to give the arguments on that appeal.

Neville, Q.C., and *P. F. Stokes*, for *W. Tucker*, on the second appeal:—

When *W. Tucker* retired from the partnership in 1883, there was a novation of the debt owing to the trustees of *Stephen Tucker's* will, and *W. Tucker* was released from his liability. But if there was no novation, the continuing partners were jointly liable with *W. Tucker*, and the payment of interest by

the continuing partners was in respect of their joint liability; *W. Tucker* is therefore protected by the 14th section of the *Mercantile Law Amendment Act* (1): *Watson* v. *Woodman* (2); *Morgan* v. *Rowlands* (3); *In re Somerset* (4). The loan was always treated as a partnership debt, and there was nothing in the contract for indemnity, nor in any other part of the deed of dissolution, which made the continuing partners agents for *W. Tucker* in the payment of the interest. The fact that *W. Tucker* knew that the loan was trust money did not constitute him a constructive trustee of it.

Chadwyck Healey, Q.C., and *W. B. Heath*, for the Plaintiffs:—

W. Tucker knew that the loan was trust money, and he became a constructive trustee for the beneficiaries under *S. Tucker's* will. There was no novation; the trustees of *S. Tucker's* will had no notice that there was any change in the firm when *W. Tucker* retired. The covenant for indemnity contained in the deed of dissolution shewed that *W. Tucker* still continued liable to the creditors; and the whole form of the deed shewed that they were to act as his agents in paying off the debts. Therefore the payment of interest must be taken as made on his account.

Haldane, Q.C., and *G. F. Hart*, for the executors and beneficiaries under the will of *W. Kayess*.

Oswald, Q.C., and *W. Fooks*, for the trustees of the will of *H. Tucker*.

A. àB. Terrell, for the Defendant *Cannon*.

Neville, in reply.

(1) 19 & 20 Vict. c. 97, s. 14: "In reference to the provisions of the Acts of the 21st Jac. 1, c. 16, s. 3, the 3 & 4 Will. 4, c. 42, s. 3, and the 16 & 17 Vict. c. 113, s. 20, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor, or administrator shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors, and administrators."

(2) Law Rep. 20 Eq. 721.

(3) Ibid. 7 Q. B. 493.

(4) [1894] 1 Ch. 231.

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1894. Aug. 8. LORD HERSCHELL, L.C.:—

These are two appeals from Mr. Justice *Romer*. The first is an appeal by the executors of *J. Kayess*, who was one of the executors and trustees of the will of *Stephen Tucker*, the testator in this action; and the second is an appeal by the Defendant *William Tucker*.

In the first case Mr. Justice *Romer* found that *Kayess* had been guilty of wilful default as trustee of the will of *Stephen Tucker*, and the learned Judge directed an inquiry (which was not to be proceeded with without the leave of the Court) as to what loss was occasioned to the estate of *Stephen Tucker* by that breach of trust. Whether any liability is made out against *Kayess'* executors for the wilful default of *Kayess* depends on whether the estate of *Stephen Tucker* has been damnified by it or not. If *William Tucker* discharges that liability no loss will accrue to *Stephen Tucker's* estate. I will therefore now deal with the appeal of *William Tucker*, and leave the appeal in the first case to stand over pending the result of the inquiry.

In the appeal of *W. Tucker* the question is, whether he is liable to make good to the trustees the sum of money deposited with *Baker, Tuckers & Co.*, or whether any claim against him has been barred by the *Statute of Limitations*.

In my opinion, it is clear that in 1883, when *William Tucker* retired from the firm, there was a debt due from him and his co-partners to the trustees, and that he continued liable. I think there was no novation at or after that date which discharged him. After his retirement the business was carried on as before, and interest on the money which had been deposited at interest with *Baker, Tuckers & Co.* was paid from time to time by the continuing partners in the name of the firm.

By the deed of dissolution it was agreed that notice thereof should not be given or advertised until the 1st of February, 1884, and after that date it was left to the option of any of the parties whether it should be advertised. By the deed the assets of the firm, including the goodwill, were to be taken over by the continuing partners, who were to pay and discharge all the debts and liabilities of the partnership, and jointly and severally indemnify the retiring partner, who was to receive by instal-

ments (the last of which fell due in December, 1884) a sum of upwards of £50,000. The deed provided that whilst any money was owing by the continuing partners to the retiring partner "under or by virtue thereof," a monthly balance-sheet should be delivered to the retiring partner, and he might at any time, by leaving notice at the counting-house of the partnership, call in the whole amount of the debt owing to him, and was thereupon entitled to collect all book-debts, and to enter on the premises and carry on the business on his own account.

It was contended on behalf of the Appellant that inasmuch as the interest had only been paid by his co-debtors and not by himself, the provisions of the *Mercantile Law Amendment Act* prevented such payment operating to keep alive his liability. But that statute merely provides that the debt shall not be kept alive as against a co-debtor by reason only of the payment of interest by another co-debtor, and was not in my opinion intended to have any application where the payment, though made by one co-debtor, was made by him for and on behalf of another co-debtor at his request.

In the present case the money deposited with the firm was deposited on the terms that interest should be paid until the principal had been repaid. It was contemplated between the parties that the business should be continued by the continuing partners, and of course that the interest should be paid. The retiring partner had an interest in the continuance of the business, for he reserved to himself the right, if any debt were due to him "under or by virtue" of the deed of dissolution, to resume possession of the business.

Under all these circumstances I think the fair inference is (and this was the conclusion at which the learned Judge below arrived) that the interest was paid from time to time by the continuing partners for and on behalf and as the agent of the retiring partner, as well as on their own account. I think, therefore, the judgment in this appeal should be affirmed.

LINDLEY, L.J.:—

William Tucker is alive, and his liability as one of the original borrowers is clear, unless he has been released or discharged by

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the trustees of the will or unless his liability is barred by the *Statute of Limitations.*

Release under seal is not alleged. It is contended that he has been discharged by the trustees. But how and when? He remained in the firm until his retirement in 1883, and up to that time he was clearly liable, either as the survivor of the two original borrowers, or jointly with his new partners if he and they can be regarded as having become so liable to the trustees. I do not see on what ground it can be maintained that the trustees of the will, one of whom was his own partner, discharged him from his then liability. This was Mr. Justice *Romer's* view, and I concur in it.

There remains the question whether his liability is barred by the *Statute of Limitations.* In order to determine this question it is not necessary to decide whether *William Tucker*, although originally only a debtor, was so mixed up with various breaches of trust as to become liable as a constructive trustee. Mr. Justice *Romer* was of opinion that he was not liable on this ground. Assuming this view to be correct, it does not affect *William Tucker's* liability as debtor; his liability as a debtor remains, and this liability, in my judgment, is not barred by the *Statute of Limitations.* Interest on the money has been regularly paid under arrangements with him ever since his retirement down to Midsummer, 1891, and, apart from the *Mercantile Law Amendment Act*, these payments would be amply sufficient to prevent the *Statute of Limitations* from running in his favour.

He, however, relies on 19 & 20 Vict. c. 97, s. 14, as affording him protection. [His Lordship read the section, and continued:—]

This section is not, in my opinion, applicable to this case. If the true view is that *William Tucker* was sole debtor the Act does not apply, and the payments of interest can only be regarded as made by the continuing partners on his behalf. On the other hand, if he and they are to be regarded as jointly liable to the trustees of the will, one of whom was, on this supposition, a co-debtor with him, I am of opinion that the provisions of the deed of 1883 were such as to shew that the payments made by the continuing partners were for the benefit and on behalf of *William Tucker* quite as much as of themselves,

and that such arrangements prevented the statute relied upon by *William Tucker* from applying to this case. Such payments were made in order to conceal his retirement from the firm, and to prevent the money from being called in by or at the instance of the *cestuis que trust*. The fact that *William Tucker's* retirement from the firm was never gazetted, and that he still retained an interest in the business, and that the payments were made to the *cestuis que trust* as he had made them, viz., by cheques in the name of the firm, strengthen the inference that they were really made on his behalf. Nor was he called as a witness to deny that this was the truth. No doubt the payments were also made by his co-partners on their own behalf, for they regarded themselves as liable for the debt, and had indemnified him against his liability to the trustees of the testator's will.

The words "by reason only" in the section must not be overlooked, and, notwithstanding *Watson* v. *Woodman* (1), I am of opinion that if a partner retires but still retains an interest in the partnership business, and he agrees with his co-partners that his retirement shall be kept secret, and that they shall pay interest on the partnership debts so as to prevent them from being called in, and such payments are made accordingly, the outgoing partner is not protected by the enactment on which *William Tucker* relies. The object of the enactment was not to facilitate frauds upon creditors, but to protect debtors from stale demands. For these reasons I am of opinion that *William Tucker* has been properly held liable for the debt in question, and that his appeal ought to be dismissed with costs.

The other appeal will stand over until it has been ascertained whether *William Tucker* can pay or not.

DAVEY, L.J.:—

On this appeal the sole question is whether the right of action against *William Tucker* is barred by the *Statute of Limitations*. It is not absolutely necessary for this purpose to say whether there was a novation when *S. B. Tucker* and *A. J. Tucker* were admitted into the firm, that is, whether *S. B. Tucker* and *A. J. Tucker* became jointly liable with *W. Tucker* for the debt. If

(1) Law Rep. 20 Eq. 721.

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there was no such novation *W. Tucker* remained the sole debtor at law, and in that case I agree with the conclusion which the learned Judge has come to, and for the reasons which he has given. I have some doubt, however, whether I should agree with the learned Judge in thinking that there was no loan by the trustees to the new firms other than the firm constituted by *S. B. Tucker* and *A. J. Tucker* alone. I think that the recitals and operative part of the deed of 1883 are evidence against the trustees, *S. B. Tucker* and *Cannon*, that the sum was at that date in the hands of the then firm of *Baker, Tuckers & Co.*, and that they stood in the relation of debtors to the trustees. The deed of 1883 is evidence against *A. J. Tucker* also, and the other parties to it, that they accepted that situation, and that the firm were the real debtors; but even if this is not so the result, in my opinion, so far as regards this appeal, is the same, because I agree entirely with the construction which has been put by the Lord Chancellor upon the section of the *Mercantile Law Amendment Act* which is referred to. With regard to the case of *Watson* v. *Woodman* (1), Vice-Chancellor *Hall* came to the conclusion upon the facts of that case that the arrangements made on the dissolution of the partnership did not constitute the continuing partners agents for the retiring partner to pay the debt. In this case I think that under the express arrangements made between them and embodied in the deed of dissolution the continuing partners paid the subsequent interest at the request of the retiring partner, and must be deemed to have paid it for the purpose of discharging his liability under arrangements with him as well as their own, or, in other words, they paid the interest on his account and as his agents; and therefore there is an arrangement between the parties which explains the payment in addition to and beyond the mere fact of payment, and therefore the *Mercantile Law Amendment Act* does not apply to the case. I am therefore of opinion that this appeal should be dismissed with costs.

Solicitors for the Plaintiffs: *Tocque & Rodyk.*

Solicitors for the Defendants: *P. H. Edwards; T. Allingham; Tufnell, Southgate, & Son; Hughes & Sons.*

(1) Law Rep. 20 Eq. 721.

M. W.

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[1859 S. 81.]

C. A.
1894
KEKEWICH, J.
May 9; *June* 5.
C. A.
July 25; *Aug.* 8.

Settled Land—Sale by Tenant for Life—Costs of Sale—Several Persons constituting Tenant for Life — Right to employ separate Solicitors — Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 6; *s.* 21, *sub-s. x.*; *s.* 53.

Upon a sale of settled land by twenty-five persons, who together constituted the tenant for life for the purposes of the *Settled Land Act*, 1882, all the vendors employed the same solicitor to conduct the sale and to deduce title to the property, but four of them employed separate solicitors to peruse and complete on their behalf the conveyances to the purchasers:—

Held, by the Court of Appeal, that the costs incurred by these separate solicitors must be paid out of the proceeds of sale.

Decision of *Kekewich*, J., reversed.

HANNAH SMITH, widow, who died in November, 1856, by her will, dated in 1852, gave her real and personal estate to trustees in trust to sell her personal estate and invest the proceeds, and to stand possessed of the income of the investments, and of the rents and profits of her real estate, in trust, in sixth shares, for the persons therein mentioned, with an ultimate trust, in certain events, to sell the real estate and divide the proceeds among the persons therein mentioned.

In 1859 this action was instituted by some of the beneficiaries against the trustees and executors for administration of the real and personal estate of the testatrix; and in 1863 an order was made on further consideration, declaring the rights and interests of the numerous parties claiming under the will.

In August, 1891, upon a petition to which all the persons, twenty-five in number, then interested in the rents and profits of the real estate were parties, either as Petitioners or Respondents, an order was made declaring that the persons then entitled, or who (but for assignments of their respective shares) would be then entitled, to the receipt of the rents and profits of the testatrix's real estate, had the powers of a tenant for life

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over that real estate within the meaning of the *Settled Land Act*, 1882.

In December, 1891, the whole of the testatrix's real estate was offered for sale by auction in six lots, five of which were then sold to five different purchasers for sums amounting in all to £2040; and in February, 1892, the remaining lot was sold to another purchaser for £430.

The sale was conducted by a Mr. *Fowle*, who in the conditions of sale was named as the solicitor to the vendors, they being therein stated to be all the persons who had the powers of a tenant for life, and the contracts of sale were expressed to be made by Mr. *Fowle* as agent for the vendors.

In August, 1892, before the completion of the purchases, an order was made upon the application of the twenty-five persons above mentioned, and the incumbrancers of some of them, appointing trustees of the will for the purposes of the *Settled Land Act*, 1882.

The conveyances to the several purchasers were subsequently executed, all the persons having the powers of a tenant for life and their incumbrancers, and also the trustees, being parties.

At the date of the sale by auction, and of the contract for sale in February, 1892, there were still twenty-five persons who had the powers of a tenant for life, and twenty-one of them employed Mr. *Fowle* as their solicitor in the action and in all matters connected with the trusts of the will. Each of the remaining four employed Mr. *Fowle* to conduct the sale on his behalf, and to deduce title to the property; but, with that exception, each of them employed an independent solicitor to represent him in such action and matters, and Mr. *Fowle* sent the draft conveyances to these solicitors to peruse on behalf of their respective clients, and also the engrossments for execution.

The proceeds of sale having been received by the trustees of the will, the question arose whether these independent solicitors were entitled to receive any costs out of the capital of the proceeds; and a summons, intituled in the action and under the *Settled Land Act*, 1882, was taken out by the trustees to obtain the decision of the Court as to what costs of the sale were payable out of the proceeds. Upon the summons coming before

the Chief Clerk, he made an order allowing Mr. *Fowle* one set of vendors' costs, according to the scale under the *Solicitors' Remuneration Act*, 1881, and a sum of three guineas to each of the other solicitors for obtaining the execution of the conveyances by his client, but disallowed those other solicitors any sum for perusal or other charges. The matter was then adjourned to Mr. Justice *Kekewich* in Chambers, who, on the 26th of February, 1894, made an order allowing only one set of costs (namely, Mr. *Fowle's*) of and incidental to the sales and conveyances, and directing those costs, when taxed, to be paid by the trustees out of the entire proceeds of sale, no costs at all being allowed to the independent solicitors.

This was a motion by the four vendors who had employed separate solicitors to vary that order by declaring that the costs of the present motion and incident to the sales and conveyances were payable out of the entire proceeds of sale; and that such of the vendors as were represented by separate solicitors in and about the said sales and conveyances were entitled to separate sets of costs. The motion was heard before Mr. Justice *Kekewich* on the 9th of May, 1894.

H. Terrell, for the motion :—

Under sect. 21, sub-sect. x., of the *Settled Land Act*, 1882, capital moneys may be applied "in payment of costs, charges, and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions," of the Act. Moreover, these costs are covered by rule 2 of the General Order under the *Solicitors' Remuneration Act*, 1881. In a partition action the rule is that, on a sale of the property, not only the plaintiff, the owner of a share, who has the conduct of the sale, is entitled to his costs, but also the solicitors of the defendants, the owners of the other shares, are entitled to the costs of perusing the conveyance and obtaining its execution by the clients: *Humphreys* v. *Jones* (1). The same rule should be applied to this case. [He also referred to *In re Beck* (2) and *Cardigan* v. *Curzon-Howe* (3).]

(1) 31 Ch. D. 30. (2) 24 Ch. D. 608.
(3) 40 Ch. D. 338; 41 Ch. D. 375.

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G. Williamson, for the twenty-one vendors who had acted by one solicitor:—

The contract, which named Mr. *Fowle* as the solicitor for all the tenants for life, was adopted and accepted by all, and it is now too late to say that Mr. *Fowle* was not their solicitor. Under sect. 2, sub-sect. 6, of the *Settled Land Act*, 1882, the twenty-five vendors constituted together, for the purpose of the sale, one tenant for life, and the sale by them as, in effect, by one tenant for life, acting through one solicitor, was the proper course, they being, under sect. 53, trustees for all persons interested. Accordingly, the tenants for life are not entitled to separate costs out of the capital, which belongs to the remaindermen.

H. Terrell, in reply:—

The true view is that each tenant for life is entitled to costs incurred in protecting himself.

Fawcus, for the trustees.

1894. June 5. KEKEWICH, J.:—

The short point in this case is this. An order for the appointment of trustees of the will for the purposes of the *Settled Land Act* was made on the application of all the parties (twenty-five in number) who constituted the tenant for life, or, more strictly speaking, the person entitled to exercise the powers of a tenant for life under the Act. The property was sold, and on the sale Mr. *Fowle* acted as the solicitor of the vendors, being instructed for that purpose by, roughly speaking, four-fifths of the several parties aforesaid. The others instructed independent solicitors, some instructing one and some another; and the question is—whether these independent solicitors are entitled to receive any and what costs out of the capital of the proceeds of sale. On the case coming before the Chief Clerk, he was of opinion that there should be only one bill of costs allowed for the vendors, to be according to scale; but that it was reasonable for Mr. *Fowle* to send the conveyances for execution by such of the vendors

as did not instruct him to the other solicitors, and that each of them should be paid three guineas for obtaining the execution by his clients; but he did not allow these solicitors anything for perusing the conveyances, or other charges. With this the independent solicitors were dissatisfied; and the matter came before me in Chambers on the 26th of February, 1894. I held that the independent solicitors were entitled to no costs at all out of the proceeds of sale; and this is a motion to discharge the order then made.

The first step in the argument of the Applicants is a reference to the *Settled Land Act*, 1882, s. 21, sub-s. x., which directs payment out of the proceeds of sale of costs, charges and expenses of or incidental to the exercise of any of the powers, or the execution of any of the provisions, of the Act. But this does not advance the matter. It is common ground that the costs properly incurred in and about the sale and the conveyances of the property to the purchasers ought to be paid out of the purchase-money; but the question is whether these costs were, from that point of view, properly incurred. The next step was a reference to the rules under the *Solicitors' Remuneration Act*, 1881, which were relied on as shewing that these solicitors were entitled to charge for their services on the lines there prescribed. I am not considering whether, as between them and their clients, they are not entitled to be paid these costs, but whether they ought to be paid out of the proceeds of sale; and the *Solicitors' Remuneration Act*, and the rules thereunder, do not seem to me to touch that question.

An argument deserving more attention was rested on the analogy of the *Partition Act*, and the practice thereunder. According to that practice, the owner of every share is entitled to appear by a separate solicitor at the cost of the entire estate; so that in an extreme case there may be paid out of the proceeds of sale as many bills of costs as there are shares. The answer to that argument is that here the parties interested have not separate shares. They together constitute one tenant for life (see *Settled Land Act*, 1882, s. 2, sub-s. 6); and a sale under the powers of the Act is necessarily the operation of all acting conjointly and not concurrently. If any statutory provision, or the

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practice of the Court, gave these independent solicitors separate bills of costs as against the proceeds of sale, I should of course be bound to allow them; and therefore I have carefully considered the question whether they are entitled wholly or partially to what they claim. But it certainly is not a case in which I should be disposed to exercise any discretion vested in me favourably towards the Applicants. The purchase-money is something over £2000; the interest of each person in the estate is necessarily small, and the costs are necessarily large. I do not think that I ought to encourage any increase of them. This remark might not be directly applicable to a case of a different character; but, as at present advised, I do not think that, even if the proceeds of sale were greater and the interests of the parties were more extensive, I should be disposed to come to a different conclusion. I see no reason why some few of a large body of tenants in common for life should indulge in the luxury of separate solicitors at the cost of the *corpus*. The settlement of conveyances to purchasers might reasonably and safely be left to the solicitor acting for the main body.

The motion must be refused with costs.

G. I. F. C.

C. A.

From this decision the four vendors who had employed separate solicitors appealed. The appeal came on for hearing on the 25th of July, 1894.

H. Terrell, for the Appellants:—

Each of the persons, who, by sect. 2, sub-sect. 6, of the *Settled Land Act*, 1882, together constituted the tenant for life, was entitled to have the assurance of his own solicitor, in whom he had confidence, that the conveyances were such as he ought to execute, and that he would be safe in executing them. It is admitted that the Appellants retained Mr. *Fowle* to conduct the sale on their behalf; they claim only that the costs incurred by them to their own solicitor for perusing the conveyances and obtaining their execution should be allowed out of the proceeds of sale. The case is analogous to that of a sale in a partition action, in which case it has been held that, the plaintiff having

the conduct of the sale, the solicitors of the defendants are entitled to be paid the costs of perusing the conveyance and obtaining its execution by their clients: *Humphreys* v. *Jones* (1). The tenants for life exercise their power of sale for the benefit of the remaindermen, and are entitled to reasonable protection before they execute the conveyance.

Fawcus, for the trustees.

G. Williamson, for the other tenants for life :—

Incumbrancers of the tenants for life are not entitled to costs: *Cardigan* v. *Curzon-Howe* (2). By sect. 53 the persons who together constitute the tenant for life are placed in the position of trustees for the other persons who are interested in the land, and they are therefore not entitled to sever and thus incur additional costs. The *Settled Land Act* only enables a tenant for life to sell; it does not compel him to do so. Therefore, when a number of persons together constitute the tenant for life, there can be no sale unless they all agree.

The scale fee prescribed by Sched. I., Part I., in the Solicitors' Remuneration Order includes "deducing title . . . and perusing and completing conveyance." Here the solicitor who conducted the sale on behalf of all the tenants for life was willing to peruse the conveyances on behalf of them all. Having regard to sect. 53, if any of them wishes to employ a separate solicitor he ought to pay the costs of so doing out of his own pocket. All the tenants for life agreed that Mr. *Fowle* should conduct the sale on their behalf; after they had gone to that extent in appointing a common solicitor, it was too late for any of them to insist on employing a separate solicitor to peruse the conveyances on his behalf and to obtain their execution.

H. Terrell, in reply :—

Mr. *Fowle* was employed by all the tenants for life only to conduct the sale and to deduce the title; he was not employed by them all to peruse and complete the conveyances,

(1) 31 Ch. D. 30. (2) 41 Ch. D. 375.

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and he was, therefore, not entitled to charge the scale fee under the Remuneration Order for deducing title and perusing and completing conveyance, because he had not done all the work which is covered by that fee.

1894. Aug. 8. LORD HERSCHELL, L.C. :—

At the time of the sale of this settled estate there were twenty-five persons who, under sub-sect. 6 of sect. 2 of the *Settled Land Act*, 1882, together constituted the tenant for life, for the purposes of that Act. These twenty-five persons had, therefore, all the powers which are conferred upon a tenant for life by that Act. By arrangement between these parties, the conduct of the sale was given to Mr. *Fowle*, a solicitor. He conducted the sale, and the conditions of sale stated that he was the vendors' solicitor. After the sale had taken place, Mr. *Fowle*, on behalf of twenty-one of the vendors, completed the sale, perusing the conveyances on their behalf, and seeing to the completion. The other four vendors employed their own solicitors, not in any way to interfere with the conduct of the sale, but, subsequently to the sale, to peruse on their behalf the conveyances which they had to execute, and to obtain the completion of the purchase. The question is, whether the costs thus incurred by these four persons, who, together with the other twenty-one, constituted the tenant for life, are to be allowed out of the purchase-money. The learned Judge has allowed only one set of costs, viz., the costs incurred by Mr. *Fowle*, the solicitor, who, as I have said, had the conduct of the sale. It is contended, on behalf of the Appellants, the four vendors who employed separate solicitors, that they were entitled to employ their own solicitors, if they so pleased, to peruse on their behalf the conveyances which they had to execute; that there was nothing to compel all the tenants for life to employ for this purpose a common solicitor, and that, as a matter of fact, the employment of Mr. *Fowle* to conduct the sale did not extend so far as to authorize him to peruse the conveyances on behalf of the whole of the vendors. By the General Order, made under the *Solicitors' Remuneration Act*, which was relied on by the Respondents, a scale fee is fixed for payment to the vendor's solicitor "for conducting a sale of property by public

auction, including the conditions of sale"; and by the same order a further fee is fixed as the payment to be made to the vendor's solicitor "for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance." It was contended that that fee would cover all that was done after the sale in the present case for all the parties. But if there were any part of the work of perusing the conveyances, &c., which was not performed by Mr. *Fowle*, and which he had not been authorized by some of the vendors to perform, it is obvious that in respect of that part he could not make the scale charge, because to that extent he would not have "perused or completed the conveyances," and would not, therefore, have brought the case within the words which I have just read. The question is, whether there is anything to disentitle these vendors—who, as it is clear from the information which we have obtained, did not authorize Mr. *Fowle* to do anything beyond conduct the sale on their behalf—whether there is anything to disentitle them from employing their own solicitors to peruse the conveyances on their behalf, and from being allowed out of the proceeds of sale the costs of their so doing. In my opinion, there is not. I think there was no more an obligation upon them to employ Mr. *Fowle* than there was an obligation on the part of the other twenty-one vendors to employ the solicitor whom the four selected. Of course, it may be a very reasonable and a very desirable thing that all the parties in such a case should agree upon a common solicitor; but, if they do not, how is the matter to be decided? Is the common solicitor to be the solicitor selected by the majority of the vendors? Where is there any power conferred upon a majority to bind the minority in such a matter? Certainly there is no such power to be found in the statute; and therefore it rests with those who impeach the action of these part tenants for life in employing their own solicitor to do this work to shew something which prevents their being entitled so to employ their own solicitor and to have the costs of that employment.

The only clause in the Act, I think, which was relied on as shewing that they were not entitled to do this is sect. 53, which says that "A tenant for life shall, in exercising any power under

C. A. 1894 SMITH v. LANCASTER. Lord Herschell, L.C.

this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties." I do not think that that section has any application to such a question as that with which we have now to deal. Of course, it was quite right to insist that when such a power as this is given to a person having only a limited estate he should, in the exercise of the power, not have regard to his own interests only, but should have regard also to the interests of all the other persons who would be affected by his acts. But that section does not, as it seems to me, affect the right of any one who takes part in a sale of this description, and whose interests and rights are in a sense independent of those of the other vendors, to protect himself, if he so thinks fit, by having the conveyance which he is to execute perused on his behalf by his own solicitor, rather than by a solicitor employed by the other vendors.

For these reasons, I think the appeal should be allowed.

LINDLEY, L.J.:—

I am of the same opinion. When the case was argued before us a few days ago I rather gathered from the statement of facts which was laid before the Court by the trustees, that the Appellants had agreed to employ Mr. *Fowle* to carry the whole business through on their behalf, and that in afterwards changing their solicitor they were really acting contrary to good faith. But, having since read the correspondence, a copy of which has been furnished to us, I am satisfied that there was no foundation for my impression, and that the Appellants never did agree to anything except that Mr. *Fowle* should conduct the sale for them, and that as to the rest of the business they entered into no agreement at all. Under these circumstances, I cannot see any principle or any rule of law which says that twenty-five persons, who are together exercising the power of a tenant for life, must all combine and employ one solicitor. I am not aware of any authority for so holding; and, there having been no agreement by the Appellants that they should do so, I think that Mr. *Terrell* is right in his contention.

DAVEY, L.J.:— C. A. 1894 SMITH v. LANCASTER.

I agree, and I think it is unnecessary for me to add anything to the reasons which have been given by my learned Brothers.

Solicitors: *Andrew, Wood & Co.*, agents for *C. Waistell, Northallerton; Williamson, Hill & Co.*, agents for *Fowle & Horsfall, Northallerton.*

W. L. C.

POWELL *v.* BIRMINGHAM VINEGAR BREWERY COMPANY.

C. A. 1894 STIRLING, J. *July* 6, 7, 24. C. A. *Aug.* 8.

[1894 P. 998.]

Trade Name—Passing off Defendants' Goods as those of Plaintiff—Injunction.

The Plaintiff and his predecessors in trade had for thirty-four years made and sold a sauce under the name of "*Yorkshire Relish*," these words being printed upon labels on the bottles and upon wrappers. In 1884 the Plaintiff registered the words "*Yorkshire Relish*" as his trade-mark, but in 1893 the trade-mark was, at the instance of the Defendants, removed from the register. Down to November, 1893, no sauce but that of the Plaintiff was in the market under the name of "*Yorkshire Relish*," but about that time the Defendants began to place on the market a sauce which they described as "*Yorkshire Relish*." This name was printed on the labels placed on their bottles and on the wrappers of the bottles, but the labels differed in their general appearance from those of the Plaintiff, and there was a statement on both the labels and the wrappers that the sauce was manufactured by the Defendants. The Plaintiff brought an action to restrain the Defendants from passing off, or attempting to pass off, their sauce as that of the Plaintiff. Upon a motion for an interim injunction, evidence was given by a chemist, who had analysed both sauces, that there was a wide difference between them:—

Held (affirming the decision of *Stirling*, J.), that the Defendants had not sufficiently distinguished their sauce from that of the Plaintiff, and that an interim injunction must be granted restraining them from using the words "*Yorkshire Relish*" as descriptive of or in connection with their sauce without clearly distinguishing their sauce from the Plaintiff's.

THIS was a motion by the Plaintiff, trading under the name of *Goodall, Backhouse & Co.*, to restrain the Defendant company from passing or attempting to pass off, and from enabling others to pass off, sauce not of the manufacture of the Plaintiff as and

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for the goods of the Plaintiff by the use of the term "*Yorkshire Relish*" or in any other way.

The Plaintiff and his predecessors in the business had for upwards of thirty-four years manufactured and sold a sauce (the composition of which was a trade secret) under the name of "*Yorkshire Relish*." This sauce had been so sold in bottles with a distinctive label of which the words "*Yorkshire Relish*" formed a conspicuous part. These bottles had been sent out to the trade in wrappers on which also appeared conspicuously the words "*Yorkshire Relish*." Under that name the sauce had been extensively advertised. Previously to the year 1884 the Plaintiff and his predecessors at various times successfully took legal proceedings to restrain the use of the words "*Yorkshire Relish*" in connection with any sauce not being his or their manufacture.

In 1884 they registered the words "*Yorkshire Relish*" as a trade-mark used before 1875, and down to November, 1893, there had not been in the market any sauce under the name of "*Yorkshire Relish*" except the Plaintiff's. In 1893, proceedings were successfully taken by the Defendant company for the removal from the register of the Plaintiff's mark, *In re Powell's Trade Mark* (1). Soon after the decision of the House of Lords in that case the Defendants began to place on the market a sauce which they described as "*Yorkshire Relish*," and thereupon the Plaintiff brought the present action. The Defendants' sauce was sold in bottles on which was placed a label which did not, in its general appearance, resemble the Plaintiff's, but contained at the top the words "*Yorkshire Relish*" in large letters, and the statement, "Manufactured by the *Birmingham Vinegar Brewery Company, Limited*, successors to *Holbrook & Co., London* and *Birmingham*." These bottles were placed in wrappers, on which also appeared the words "*Yorkshire Relish*," accompanied by the like statement. The sauces of the Plaintiff and the Defendants had been analysed by a chemist, who stated that there was a wide difference between them, and that they were decidedly different sauces; and, there being no evidence to the contrary, it was assumed by his Lordship for the purposes of the present motion that they were different. The Court further came to

(1) [1893] 2 Ch. 388; [1894] A. C. 8.

the conclusion upon the evidence that, until the Defendants commenced to make and sell their sauce, the wholesale and retail dealers who ordered sauce under the designation of "*Yorkshire Relish*" knew that it was manufactured by the Plaintiff, and relied on its being so manufactured; and that many of the consumers probably knew nothing of the manufacturer, but when they ordered sauce under that name expected to get that which they had been accustomed to buy—viz., sauce of the Plaintiff's manufacture. From the evidence given as to the result of the Defendants placing their goods on the market under the name of "*Yorkshire Relish*," the Court formed the opinion that an unwary purchaser who observed the words "*Yorkshire Relish*" prominently on the Defendants' label, and bought the Defendants' article, although the label was different, might very well be deceived into thinking that the label was a new one and that he was getting the Plaintiff's sauce. The question upon the motion was whether, under the circumstances, the Plaintiff was entitled to the injunction which he claimed, notwithstanding that he had no exclusive right to the use of the term "*Yorkshire Relish*."

The motion came on for hearing before Mr. Justice *Stirling* on the 6th of July, 1894.

Hastings, Q.C., and *John Cutler*, for the Plaintiff:—

The Defendants are not entitled to use the words "*Yorkshire Relish*" in connection with sauce not of the Plaintiff's manufacture, without clearly distinguishing their goods from his: *Montgomery* v. *Thompson* (1); *Reddaway* v. *Bentham Hemp-Spinning Company* (2).

The decision of the House of Lords in *Powell* v. *Birmingham Vinegar Brewery Company* (3) does not justify the Defendants in what they are doing.

Where a manufacturer has had a particular article in the market for over thirty years under a particular name, it is not competent for another trader to introduce an article of quite a different manufacture under that name. In that sense the

(1) [1891] A. C. 217. (2) [1892] 2 Q. B. 639.
(3) [1894] A. C. 8.

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Plaintiff is entitled to the exclusive use of the words "*Yorkshire Relish.*"

Moulton, Q.C., *Buckley*, Q.C., and *Vernon R. Smith*, for the Defendants:—

Since the decision of the House of Lords (1) the term "*Yorkshire Relish*" is *publici juris*. Lord *Herschell*, in that case (2), says: "I do not think it can be doubted that the rights of any person who was in the trade and who might desire to make use of the words '*Yorkshire Relish*' would be less if this mark were upon the register than they would be if he were only subject to the common law liability of being restrained from making any attempt to pass off his goods as the goods of another person."

[STIRLING, J.:—No doubt the use of the words is free as were the words "*Stone Ale*" in *Montgomery* v. *Thompson* (3), and "*Glenfield Starch*" in *Wotherspoon* v. *Currie* (4); but you must effectually distinguish your goods.]

Upon the general appearance of the make up and labels, it is not possible for our goods to be mistaken for the Plaintiff's.

[STIRLING, J.:—You must prove that the unwary purchaser will not be deceived.]

Our label is calculated to distinguish the goods. The Plaintiff has hitherto restrained others from making this article by virtue of the registration to which it has now been held he is not entitled. The Defendants are now making a particular article and calling it by that name by which alone it is known. We desire to make and sell a popular sauce, but not to represent that it is made by the Plaintiff. He has no exclusive right to the name. "*Yorkshire Relish*" does not indicate a particular manufacturer's brand, but only a certain kind of sauce. For thirty years, no doubt, the Plaintiff has been the sole manufacturer, and therefore it cannot be said that the words "*Yorkshire Relish*" indicate sauce of his manufacture as distinguished from that of any other maker.

[STIRLING, J.:—How do you distinguish *Montgomery* v. *Thompson*?]

(1) [1894] A. C. 8.
(2) Ibid. 10.
(3) [1891] A. C. 217.
(4) Law Rep. 5 H. L. 508.

Relish is not in the same sense a specific article as ale is. "*Yorkshire Relish*" is the specific article. It is the name of a specific article manufactured according to a specific receipt. You must use the word "*Yorkshire*" in connection with the "Relish" in order to describe the article.

[STIRLING, J.:—How can you avoid inducing the public to believe that what you are selling is what they have been accustomed to get, viz., the Plaintiff's sauce?]

We use a different label to shew that it is our manufacture.

[STIRLING, J.:—Is there any case in which one person has manufactured an article for twenty years under a certain name, and another person has been held entitled to make it under the same name, without distinguishing his manufacture from the original?]

Linoleum Manufacturing Company v. *Nairn* (1).

[STIRLING, J.:—The distinction between that case and this is that you are not making the same article as the Plaintiff.]

That is not a matter on which he can rely in this action.

[STIRLING, J.:—It is your first step, and you fail in it.]

We admit we are not entitled to sell our sauce as *Goodall & Co.'s Yorkshire* Relish.

[STIRLING, J.:—You are in a dilemma. Either it is a specific article, in which case you are not making it, or else the case comes within *Montgomery* v. *Thompson* (2).]

We have not put into the hands of the retail dealers the power of deceiving the public, unless the mere use of the words does it.

[STIRLING, J:—The burden is on you to distinguish your article: *Reddaway* v. *Bentham Hemp-Spinning Company* (3).]

We have endeavoured to do so.

1894. July 24. STIRLING, J.:—

The decision of the House of Lords in *Powell* v. *Birmingham Vinegar Brewery Company* (4) conclusively establishes that the

(1) 7 Ch. D. 834.
(2) [1891] A. C. 217.
(3) [1892] 2 Q. B. 639.
(4) [1894] A. C. 8.

C. A. 1894 POWELL v. BIRMINGHAM VINEGAR BREWERY COMPANY. Stirling, J.

words "*Yorkshire Relish*" do not constitute a trade-mark of the Plaintiff's capable of registration under the *Patents, Designs, and Trade Marks Act*, 1883. The Plaintiff, nevertheless, may be entitled to such rights in respect of the words as entitle him to sue. In the *Singer Manufacturing Company* v. *Loog* (1), Lord *Blackburn* says: "A name may be so appropriated by user as to come to mean the goods of the plaintiffs, though it is not, and never was, impressed on the goods, or on the packages in which they are contained, so as to be a trade-mark, properly so called, or within the recent statutes. Where it is established that such a trade name bears that meaning, I think the use of that name, or one so nearly resembling it as to be likely to deceive, as applicable to goods not the plaintiffs', may be the means of passing off those goods as and for the plaintiffs' just as much as the use of a trade-mark; and I think the law (so far as not altered by legislation) is the same." It is not necessary to consider whether in cases of the class spoken of by Lord *Blackburn* it is possible that the plaintiff may have an absolute or exclusive right to the name. Ordinarily, at all events, the plaintiff's right is not so extensive, and is limited to preventing any one from so using the name as to pass off his goods as the goods of the plaintiff. It was one of the grounds of the decision of the Court of Appeal and of the House of Lords that the right of the present Plaintiff is of the latter kind. Evidence of a very similar nature to that which is now before me was adduced in the former litigation, and Lord Justice *Lindley* speaking of it says (2): "The evidence shews that this term '*Yorkshire Relish*' has been used by the firm which the appellant represents to denote a sauce made by them ever since 1862, and they have got a reputation for it; but what is most important to observe is this, that they have no exclusive right to the use of the words '*Yorkshire Relish*' unless they can maintain this particular registered mark. Their right, apart from that, is to prevent anybody from selling '*Yorkshire Relish*' in such a way as to pass off his goods for the appellant's. That is the whole of their right." Lord Justice *Bowen* says (3): "In this particular case

(1) 8 App. Cas. 15, 32. (2) [1893] 2 Ch. 401.
(3) [1893] 2 Ch. 407.

it is perfectly true that '*Yorkshire Relish*' denotes the article which is made by, and has been made for many years by, the appellant's firm, and it looks extremely unlikely that any person, even the respondents, could now use the term '*Yorkshire Relish*' without running great risks. But if '*Yorkshire Relish*' is not a term to which the appellant has the exclusive right, it is conceivable that the respondents, or any other persons in the trade might by an honest and strong endeavour, carried out effectually, so distinguish the sale of the article which they are selling from the sales of the appellant's sauce, or so distinguish the manufacture of the article which they manufacture from the manufacture of the appellant's sauce, as to prevent the possibility of the outside customer being deceived. It is impossible for a Court of Law to say that it might not be done, and if it can be done, the trade have a right to have that door left open to them." The same views were expressed, as I understand it, more shortly in the House of Lords by the Lord Chancellor, where he says (1): "In the present case I do not think it can be doubted that the rights of any person who was in the trade and who might desire to make use of the words '*Yorkshire Relish*' would be less if this mark were upon the register than they would be if he were only subject to the common law liability of being restrained from making any attempt to pass off his goods as the goods of another person."

The case of *Reddaway* v. *Bentham Hemp-Spinning Company* (2), shews, that in order to entitle the Plaintiff to an injunction, it is not necessary for him to make out a case of actual fraud or intention to mislead on the part of the Defendants, but it is sufficient if he establishes two things, first, that the words "*Yorkshire Relish*" mean a sauce manufactured by the Plaintiff as distinguished from sauce made by other manufacturers, and secondly, that the Defendants so describe their sauce as to be likely to mislead the purchasers and to lead them to buy the Defendants' sauce, as, and for the sauce of the Plaintiff. The Defendants contend that the Plaintiff fails to make out either of these two things. As regards the former, it is said that the name "*Yorkshire Relish*" has been simply used to designate or

(1) [1894] A. C. 10. (2) [1892] 2 Q. B. 639.

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describe the article manufactured by the Plaintiff, and could not, before November last, mean the manufacture of the Plaintiff as distinguished from that of other manufacturers, because down to that time the Plaintiff was the sole manufacturer. It is urged that the Plaintiff has no monopoly in the manufacture, and that the Defendants consequently have a right to make and sell the same, or even a different article, and call it by the name of "*Yorkshire Relish.*"

Now, a point which seems to me to be similar to this was raised, and dealt with by Lord Justice *Fry*, when a Judge of First Instance, in the case of *Siegert* v. *Findlater* (1). There the plaintiffs sought to restrain the defendants from using the word "*Angostura*" in connection with the manufacture of an article known as "*Angostura Bitters.*" It was established that the plaintiffs' preparation was made according to a recipe which was known only to themselves—that it was in fact a trade secret. It was admitted, as is stated in the report (2), that the defendants' preparation was different from that of the plaintiffs. In the course of the argument Mr. Justice *Fry* says (3): "The name '*Angostura Bitters*' has been used to signify the particular article manufactured by the plaintiffs, and it has only indirectly denoted the maker of the article, because the plaintiffs have been the only makers of that article. But any person who could discover the secret of the manufacture would have a right to make and sell the same article, the plaintiffs having no patent right. How, then, can I restrain the defendants absolutely from using the word '*Angostura*'? If they should even make the same thing as the plaintiffs, they would surely have a right to call it '*Angostura Bitters.*' It is not like the *Singer Case* (4), where the name '*Singer*' originally indicated the maker of the machine, nor is it like the *Glenfield Starch Case* (5), where 'Starch' was the *genus* and '*Glenfield*' was the *species*, and shewed that '*Glenfield Starch*' was made by a particular manufacturer." I think that is shortly and concisely the argument which, on this part of the case, was addressed to me on behalf of the Defendants

(1) 7 Ch. D. 801.
(2) Ibid. 803.
(3) 7 Ch. D. 805.
(4) 8 App. Cas. 15.
(5) Law Rep. 5 H. L. 508.

in the present case. They put the same point which was put for the defendants in *Siegert* v. *Findlater* (1). The defendants' counsel in *Siegert* v. *Findlater* said: "There is no representation that our article is that of the plaintiffs," and the manufacturer's name appeared plainly on the face of the bottle, as it does here. "When the public asked for '*Angostura Bitters*,' they did not ask for the plaintiffs' bitters." Mr. Justice *Fry* says: "When you add the fact that the plaintiffs were the sole manufacturers of the article, it is clear that the public meant the plaintiffs' bitters, though this was not actually present to the mind of the purchaser." Then the argument goes on: "But as soon as it became known that some one else was making '*Angostura Bitters*,' a purchaser must know that in asking for '*Angostura Bitters*' he will not necessarily get the plaintiffs' article." And Mr. Justice *Fry* says: "The common usage by men of business at the place itself after the alteration of name had been made is very material upon the question whether any man of business desiring to act honestly would call his goods '*Angostura*' after the name had been changed." Then, in the course of the judgment (2), he deals with this point: "It was originally suggested that I should restrain the use of the word '*Angostura*' absolutely, and that was sought by the statement of claim"—that is, the plaintiffs there put forward a claim to the absolute or exclusive right to the name "*Angostura*." "I took an opportunity," says Mr. Justice *Fry*, "of pointing out the difficulty I should have in doing this. The plaintiffs have been for many years, so far as it appears, the sole makers of these particular bitters, which have been made according to a recipe possessed by them but never published. Just in the same way *Meinhard* has a recipe which he has never divulged, which he does not assert to produce the same thing as that which is made by the plaintiffs, but which produces a different bitter. The two are perfectly distinguishable, both in colour and taste. I cannot say that *Meinhard* may not, if he can, make a bitter identical with the plaintiffs', and, if he does so, I cannot prevent him from selling it as '*Angostura Bitters*.' It is to be observed that the person who produces a new article, and is the sole maker

(1) 7 Ch. D. 801, 807. (2) 7 Ch. D. 813.

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of it, has the greatest difficulty (if it is not an impossibility) in claiming the name of that article as his own, because, until somebody else produces the same article, there is nothing to distinguish it from. No distinction can arise from using the name of the class so long as the class consists of only one species, for then the name of the species and the name of the class will be the same. Because persons in *England* have called the actual thing made '*Angostura Bitters*,' the term has been applied to the plaintiffs' make. It is quite true that, to a person who knows that these bitters are made only by the plaintiffs, the use of the term '*Angostura Bitters*' carries with it a reference to the plaintiffs' make, but the expression is really used to denote the thing itself; that is what it primarily denotes. The reference to the maker only arises when there is superadded to the thought of the thing the thought of the person who makes it; a thought which seldom arises in the mind of the purchaser, who cares nothing about the maker, but only about the thing which he is buying." Now, down to that point, the learned Judge, as I read it, is dealing with the claim to the absolute use of the word "*Angostura*." Then he goes on to deal with the point which is similar to that which I have to deal with. "There remains, however, the question whether I can restrain the use of the words '*Angostura Bitters*' when they are used in such a way as to produce the belief on the part of the purchaser that *Meinhard's* bitters are the bitters made by the plaintiffs. The point has been put very prominently forward on both sides, for *Meinhard* claims, by virtue of his first use of the words '*Angostura Bitters*' on his goods, and also by his entering his wrapper at *Stationers' Hall* before the plaintiffs adopted the use of those words, to be entitled to the exclusive use of the term '*Angostura Bitters*.' I do not think that claim can be maintained. I think that, so far as *England* is concerned, the term '*Angostura Bitters*' means a bitter of the kind which is made by the plaintiffs. The bitter made by *Meinhard* is not of that kind, but is distinct from it. I think, therefore, that when *Meinhard* used the words '*Angostura Bitters*,' as applied to the bitters which he made, he did so as part of that scheme of fraud of which I have found him guilty. I think I am at liberty to restrain his agents from such a use of

those words. I disclaim any intention of binding the world down to one particular meaning of the words '*Angostura Bitters*,' or of preventing the defendants from selling, if they can, bitters like the plaintiffs', or from selling any other bitters, but I am entitled to restrain them from deceiving the public. The injunction will, therefore, be to restrain the defendants, their servants and agents, from using the words '*Angostura Bitters*,' or the word '*Angostura*,' on any bitters or any other fluids contained in bottles, not made by the plaintiffs, so as to induce the belief that such bitters or fluids are made by the plaintiffs." He did not grant any further relief on the other part. It appears, therefore, that although Mr. Justice *Fry* held that the plaintiffs had no exclusive title to the name "*Angostura Bitters*," they nevertheless had such a right or interest in the name as to entitle them to an injunction to restrain the use of the words so as to induce the belief that the article was made by the plaintiffs. It is true that the case was one in which actual fraud was established; but, as I have said, it is clearly laid down in *Reddaway* v. *Bentham Hemp-Spinning Company* (1) that the Plaintiff may succeed, so far as an injunction is concerned, without proving fraud.

On behalf of the Defendants, reference was made to, and reliance was placed on, another decision of the same learned Judge, namely, that of the *Linoleum Manufacturing Company* v. *Nairn* (2). There the plaintiffs, or their predecessors in title, had had a patent for the manufacture of a floor-cloth, to which was given the name of "*Linoleum*." The patent had expired. The defendants, who were manufacturers of that article, made it according to the patent, and called it "*Linoleum*"; and an action was brought to restrain them from so doing. In dealing with the case (3) the learned Judge says: "In the first place, the plaintiffs have alleged, and Mr. *Walton* has sworn, that having invented a new substance, namely, the solidified or oxidized oil, he gave to it the name of '*Linoleum*,' and it does not appear that any other name has ever been given to this substance. It appears that the defendants are now minded to

(1) [1892] 2 Q. B. 639. (2) 7 Ch. D. 834.
(3) 7 Ch. D. 836.

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make, as it is admitted they may make, that substance. I want to know what they are to call it. That is a question I have asked, but I have received no answer; and for this simple reason, that no answer could be given, except that they must invent a new name. I do not take that to be the law. I think that if '*Linoleum*' means a substance which may be made by the defendants, the defendants may sell it by the name which that substance bears. But then it is said that although the substance bears this name, the name has always meant the manufacture of the plaintiffs. In a certain sense that is true. Anybody who knew the substance, and knew that the plaintiffs were the only makers of this substance, would, in using the word, know he was speaking of a substance made by the plaintiffs. But, nevertheless, the word directly or primarily means solidified oil. It only secondarily means the manufacture of the plaintiffs, and has that meaning only so long as the plaintiffs are the sole manufacturers." So that the learned Judge there takes notice that during the continuance of the patent the name given to the patented article secondarily denotes the manufacture of the plaintiffs so long as the plaintiffs are the sole manufacturers, that is, so long as the patent continues. "In my opinion," —he goes on—"it would be extremely difficult for a person who has been by right of some monopoly the sole manufacturer of a new article, and has given a new name to the new article, meaning that new article and nothing more, to claim that the name is to be attributed to his manufacture alone after his competitors are at liberty to make the same article. It is admitted that no such case has occurred, and I believe it could not occur; because until some other person is making the same article, and is at liberty to call it by the same name, there can be no right acquired by the exclusive use of a name as shewing that the manufacture of one person is indicated by it and not the manufacture of another."

Now, a similar point was discussed in the well-known case of *In re Palmer's Trade-mark* (1), which related to an article which had been the subject-matter of a patent. There Lord Justice *Cotton* makes the following important observations (2): "It is

(1) 24 Ch. D. 504. (2) 24 Ch. D. 520.

very true (and although this was not mentioned in argument I mention it to shew that it has not been overlooked) that if any one during the existence of the patent had applied the name which the patentee had given to his article to an article not an infringement of the patent he would probably have been stopped by injunction, but only because, although it would not have been an infringement of the patent, it would have been a false representation that what he was selling was the patented article."

These cases appear to me to shew that the maker of a secret preparation or a patented article may, while the secret remains undiscovered or the patent is unexpired, obtain an injunction to restrain the sale of goods of a different kind under the name by which the preparation or article is known.

Now, that being so, it appears that down to November last the Plaintiff was the sole manufacturer of "*Yorkshire Relish*," and he still is the sole manufacturer of the article, which prior to that time was so designated, for, upon the evidence before me, it must be taken that the article manufactured by the Defendants differs from that made by the Plaintiff. The Defendants, therefore, stand in a similar position to the defendants in *Siegert* v. *Findlater* (1), or to persons who, during the continuance of the patent, apply the name of the patented article to something not made in accordance with the patent. In my opinion, therefore, the Defendants, if they desire to use the words "*Yorkshire Relish*" in connection with their sauce, are bound to take similar precautions to those which the law imposes on persons who desire to apply, in connection with their goods, designations to which a plaintiff has no exclusive title, but which, by use in a secondary sense, have come to denote the plaintiff's manufacture. On that it is sufficient to refer to *Seixo* v. *Provezende* (2); *Massam* v. *Thorley's Cattle Food Company* (3); and *Montgomery* v. *Thompson* (4).

The question then arises, whether the Defendants have taken the proper precautions? In my opinion, they have not. It is quite true that the Plaintiff's and Defendants' labels are different,

(1) 7 Ch. D. 801.
(2) Law Rep. 1 Ch. 192.
(3) 14 Ch. D. 748.
(4) [1891] A. C. 217.

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and that the name of the Defendants or their predecessors appears conspicuously on the bottles and wrappers which contain their manufacture. Nevertheless, the words "*Yorkshire Relish*," which are what Lord Justice *Lindley*, in the case to which I have so often referred—*Reddaway* v. *Bentham Hemp-Spinning Company* (1)—calls "the catch words," form so conspicuous a part of the Defendants' label that, in my judgment, the unwary purchaser, who either knows nothing about the manufacturer, or who does not happen to remember the name of the manufacturer of the article which he has been accustomed to buy, is extremely likely to be misled into purchasing the Defendants' sauce when he means to buy the Plaintiff's. The Plaintiff's evidence appears to me to shew that this has actually happened. It is not for me to say how the Defendants are effectually to distinguish their goods. I take the law as regards this to be as laid down by the Lord Chancellor in *Montgomery* v. *Thompson* (2), where he says: "The respondents are entitled to ask that a rival manufacturer shall be prevented from selling his ale"—that being the subject-matter of manufacture there—"under such a designation as to deceive the public into the belief that they are obtaining the ale of the respondents, and he ought not the less to be restrained from doing so, because the practical effect of such restraint may be much the same as if the persons seeking the injunction had a right of property in a particular name." In my opinion, therefore, the Plaintiff is entitled to an injunction in the form approved of by Lord *Watson* and Lord *Macnaghten* in *Montgomery* v. *Thompson* (3). The injunction will run: "To restrain the Defendants from using the words '*Yorkshire Relish*' as descriptive of or in connection with any sauce or relish manufactured by them, or sauce or relish not being of the Plaintiff's manufacture, sold or offered for sale by them without clearly distinguishing such sauce or relish from the sauce or relish of the Plaintiff."

G. A. S.

C. A.

The Defendants appealed from this decision, and they adduced some fresh evidence, among which were affidavits by a manufac-

(1) [1892] 2 Q. B. 639. (2) [1891] A. C. 220.
(3) [1891] A. C. 221.

turer of sauces and some grocers to the effect that they had tasted both sauces and had come to the conclusion that the two were identical. The appeal was heard on the 8th of August, 1894.

Moulton, Q.C., *Buckley*, Q.C., and *Vernon R. Smith*, for the Defendants.

Hastings, Q.C., and *John Cutler*, for the Plaintiff, were not called upon.

LINDLEY, L.J.:—

This not being the trial of the action, we are not disposed to alter the order of the learned Judge. The case is a difficult one, and I will say nothing about it, except that I do not understand the order as restraining the Defendants from using the name "*Yorkshire Relish*" under all circumstances. They must use the name at their own risk. We dismiss the appeal, and the costs will be costs in the action.

LOPES, L.J., and DAVEY, L.J., concurred.

Solicitors: *Thorowgood, Tabor, & Hardcastle; J. S. Salaman.*

W. L. C.

C. A.
1894
WRIGHT, J.
June 28.
C. A.
Aug. 9.

SOMERSET *v.* LAND SECURITIES COMPANY.

[1894 S. 1254.]

Land Registry—Mortgage Debentures—Land Securities Company—Deposit of Securities with Registrar—Order for Redelivery—Mortgage Debenture Act, 1865 (28 & 29 *Vict. c.* 78), *ss.* 10, 46—*Mortgage Debenture* (*Amendment*) *Act*, 1870 (33 & 34 *Vict. c.* 20), *ss.* 8, 9.

The Court has no power to order securities, which have been deposited with the Registrar of the Land Registry Office by a Land Securities Company, to be delivered up to a receiver appointed in a debenture-holders' action, or to a liquidator in the winding-up of the company, unless such securities have been redeemed or sold.

The decision of *Wright*, J., reversed.

THE *Lands Securities Company* was a company established under the *Mortgage Debenture Act*, 1865, for advancing money to landowners on the security of their lands. Under the provisions of that Act and the *Mortgage Debenture* (*Amendment*) *Act*, 1870, the securities were to be deposited at the office of the Land Registry; and the company was empowered to issue debentures, the amount of which was always to be kept below the amount of the securities deposited with the Land Registry. The amount of the securities thus deposited was very considerable. Owing to the depression in the value of land there had been a depreciation in the value of the securities, and the interest of the debenture-holders was endangered.

The present action was accordingly commenced by a debenture-holder on behalf of himself and all other debenture-holders for the realization of their securities, and a receiver was appointed on the 30th of March, 1894 in the action, of the principal and interest due on the debentures. On the 10th of April, 1894, an extraordinary resolution was passed for the voluntary winding-up of the company, and the receiver in the action was appointed liquidator; and on the 3rd of May an order was made continuing the winding-up under supervision. On the 9th of June an application by summons was made by the receiver in the action asking that the Registrar of the Land Registry might

deliver up to him all deeds and documents in his possession which had been deposited by the company.

The summons was adjourned into Court and heard by Mr. Justice *Wright* on the 28th of June, 1894.

Farwell, Q.C., and *Kirby*, for the Applicant:—

The *Mortgage Debenture Acts* were passed to protect the debenture-holders by preventing a company from realizing the securities deposited to cover the debentures, and thus diminishing the debenture-holders' security (1). The securities must

(1) The principal sections of these statutes referred to in the argument were as follows:—

28 & 29 Vict. c. 78, s. 9: This section enacts that upon deposit with the Registrar of securities held by the company, and the deeds relating thereto, and the certificate of the company, and a declaration by a surveyor, the Registrar may register the deeds creating the security.

Sect. 10 prescribes the form of the declaration by the surveyor, and proceeds: "There shall also be delivered with the before-mentioned deeds or instruments a schedule, under the hand of the secretary or one of the directors of the company, of the deeds and documents which were delivered to the company at the time when the security was executed to them, which deeds or documents shall be deposited with the Registrar, to be retained by him until withdrawn as hereinafter provided."

Sect. 41 provides that any person entitled to any mortgage debenture of the company may from time to time enforce the payment of any arrears or interest or principal by procuring the appointment of a receiver.

Sect. 45 empowers the Court to remove the receiver, and to make such orders and give such directions as to his powers and duties, and as to the disposal of the moneys received by him, as may be thought fit.

Sect. 46 is as follows: "Subject to any such orders and directions, the receiver shall be entitled to receive or recover the whole or a competent part of the principal moneys, instalments, annuities, interest, and other moneys from time to time payable to the company upon and in respect of their registered securities, and also any moneys standing to the account of the company's mortgage debentures under the provisions of sect. 17 until the principal and interest due on all the debentures issued by the company, together with all costs, including the reasonable and proper charges of such receiver, shall have been fully paid; and upon such appointment being made, and notice thereof to the several persons liable upon such registered securities, all such moneys from time to time payable upon or in respect of such registered securities shall be paid to and received or recovered by such receiver; and the receiver shall apply the same, as from time to time received or recovered by him, first, to the payment of all such costs, and afterwards to the discharge and payment of all interest, or principal and interest, as the case may be, due upon such mortgage debentures; and after such costs, and such interest, or principal and interest,

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now be realized in the interest of the debenture-holders. The Registrar is a mere stake-holder, and it was not the intention of the Legislature that his possession of the deeds should be allowed to interfere with the exercise of the receiver's duties under sect. 46 of the Act of 1865. It is absolutely necessary that he should now have possession of all the deeds so that he may realize the securities.

Rowden, for the company and the liquidator:—

The Act was passed for the benefit of the debenture-holders, but it will prejudice them by paralyzing the realization of the securities and the winding-up of the company, unless the receiver is allowed to have possession of all the deeds and documents.

Ingle Joyce, for the Registrar:—

The debenture-holders are not the only persons interested in the deposited documents. The Acts of 1865 and 1870 impose on the Registrar a statutory duty as to keeping the documents, and he is only desirous of performing that duty. Provision is made by the Acts for delivery out of the documents on the happening

shall have been fully paid, the power of such receiver shall cease."

33 & 34 Vict. c. 20, s. 8: "Whenever any person for the time being entitled to redeem a security which has been registered under the provisions of this or 'the principal Act' has given notice to the company of his intention so to do, or if the company shall themselves at any time be desirous of freeing and discharging any registered security, the company, in the case first mentioned, shall before the day appointed for the redemption, and, in the case secondly mentioned, may at any time make application to the Registrar for the purpose of having such respective security freed and discharged from the charge of the mortgage debentures issued by the company, and upon its being made to appear to his satisfaction that the aggregate of the principal sums secured by all the mortgage debentures of the company then outstanding does not exceed the total amount (to be ascertained in the manner provided by 'the principal Act') of the registered securities of the company at the time being, exclusive of that proposed to be discharged, he shall allow the same to be so freed and discharged, and shall cause an entry to be made in the register of securities of the said security being discharged, and shall on request redeliver to the company the several deeds or instruments to which such security relates, and which were delivered to the Registrar for registration under the provisions in that behalf contained in 'the principal Act,' and such entry shall be conclusive evidence of such discharge."

of certain specified events; but no such event has yet happened, and the Court has no jurisdiction to order the Registrar to give up the deeds, nor has it any general power to control the officers of the Land Registry. If there is any jurisdiction, and the Registrar is supposed to be not doing his duty, the application to the Court should be for a mandamus to compel him to do it. What is asked, is that the documents may be delivered *en bloc* to the receiver. Such a transaction is not only contrary to the Act, but is unnecessary. The receiver can always see the documents at the Land Registry, and if there is a sale the Registrar will probably raise no objection to the documents relating to the particular security realized being handed out—at any rate, if the money is paid into Court.

Farwell, in reply:—

It is the usual practice to allow a receiver to hold the securities. It is absolutely necessary that the documents should be handed to him *en bloc*. The company has in effect given a statutory mortgage, in favour of the debenture-holders, of its own securities, and the mortgagees are now asking that their receiver may have their own securities for the purposes of realization.

WRIGHT, J.:—

I think that there must be power for the Court to direct the Registrar to hand over the deeds when it is necessary for the carrying out of the purposes of the Act that they should be handed over. Sect. 46 of the Act of 1865 certainly contemplates circumstances which would require the handing over of the securities in the hands of the Registrar. But, on the other hand, I cannot read into the Act by implication more than is necessary for carrying out the purposes of the Act. The question is, is it necessary for the carrying out of the purposes of the Act that all these deeds should be handed over *en bloc*? It is said that it is, and for two reasons—first, on account of the debenture-holders' action; and, secondly, on account of the liquidation. There is nothing in either of the Acts which gives me any assistance at all; but it seems to me that it is much more convenient and more desirable that when all the affairs of the company are to be dealt

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with one order should be made at once to save expense, rather than that the Court should wait to see what orders may be from time to time required.

I think that I ought to make the order; but if any safeguards can be suggested, such as bringing the documents into Court, I am willing that they should be adopted. The Registrar will not incur any liability or risk for anything done by him as Registrar and in good faith under the order of the Court if the Court has jurisdiction to make the order, or even, I think, if it has not jurisdiction.

F. E.

C. A. From this order the Registrar appealed. The appeal was heard on the 9th of August, 1894.

Ingle Joyce, for the Appellant:—

We do not desire to raise the question whether the Court has any jurisdiction to make such an order against the Registrar, who is no party to the action, and are willing that this should be treated as an order made in the winding-up of the company, and that the receiver should be treated as having been appointed under the *Mortgage Debenture Act*; but we contend that no such order can be made either in the action, or in the winding-up, or in any other proceeding. By the 10th section of the first-mentioned Act it is enacted that the deeds and documents relating to the securities are to be deposited with the Registrar, "to be retained by him until withdrawn as hereinafter provided"; and there is no provision in the Act for his giving them up except in the case of the redemption of the particular security required to be delivered up. There is no provision in either Act for realization of the securities by sale or for their being given up to the liquidator if the company is wound up. The Registrar has offered to give every facility to the receiver to examine the deeds in case of a sale; and if any particular security were sold no doubt the Registrar would give up the deeds; but the receiver now asks for all the securities to be given up *en bloc*, which is in no way authorized by the Acts.

[He referred to the following sections: 28 & 29 Vict. c. 78, ss. 3, 4, 6, 9, 10, 11, 12, 13, 16, 46, 47; and 33 & 34 Vict. c. 20, ss. 7, 8, 9.]

Farwell, Q.C., and *Kirby*, for the Receiver:—

The application is made under sect. 46 of the Act of 1865. Although nothing may be said in the section as to delivering up the deeds for the purpose of realizing the securities, it follows from the section, by necessary implication, that they must be delivered up, otherwise the securities could never be realized. If the arguments of the Appellant be right the deeds would never be delivered up at all if the securities are reduced in value below the money secured, for the mortgagors would never redeem them. It cannot be doubted that the Court can order any particular securities to be given up if they should be sold, and if so it will be a great saving of expense if they are all given at once to the receiver as directed in the order. The expense of attending at the office to examine each particular security, and the fees payable to the office, would be enormous.

Rowden, for the company, supported the same view.

LINDLEY, L.J.:—

I do not see how we can affirm the order made by Mr. Justice *Wright*. The real difficulty arises from this, that the Land Registry is a public office and the Registrar of the Land Registry is a public officer, and under sect. 10 of the *Mortgage Debenture Act* of 1865, which is still unrepealed, there is this provision: "There shall also be delivered with the before-mentioned deeds or instruments a schedule, under the hand of the secretary or one of the directors of the company, of the deeds and documents which were delivered to the company at the time when the security was executed to them, which deeds or documents shall be deposited with the Registrar, to be retained by him until withdrawn as hereinafter provided." That is in the Act of Parliament. I ask myself this: What power has this Court, or any other Court, to direct the Registrar to deliver up these deeds unless they are withdrawn "as hereinafter provided"? I can understand this, that it may be right in principle that when you have referred to the purposes of the Act, and you find that all the purposes for which these securities are deposited are satisfied, and that there is no purpose for which they can be retained, a

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necessary implication may arise that they ought to go back to those who own them. That is possible, but we are far short of that: we have not arrived at any such stage, or anything like it. We are asked, because there is a debenture-holders' action and a winding-up, and there is a gentleman who is a receiver in the debenture-holders' action and liquidator in the winding-up, to say that he is the proper person to have all these things, and not the public official appointed by statute. It may be convenient, or it may not be, but there is no necessary implication, nor anything like a necessary implication, to the effect that this deposit has answered all the purposes contemplated. I think the order must be discharged.

LOPES, L.J.:—

I am of the same opinion. I see no way of getting over the words of sect. 10 of the Act of 1865, which provides for the documents being retained until withdrawn, as thereinafter provided; and I see in sect. 8 of the Act of 1870—relating to proceedings on redemption of securities—there is specified how, in the case of redemption, the deeds are to be redelivered. It says: "The company . . . in the case secondly mentioned, may at any time make application to the Registrar for the purpose of having such respective security freed and discharged from the charge of the mortgage debentures issued by the company, and upon its being made to appear to his satisfaction that the aggregate of the principal sums secured by all the mortgage debentures of the company then outstanding does not exceed the total amount (to be ascertained in the manner provided 'by the principal Act') of the registered securities of the company at the time being, exclusive of that proposed to be discharged, he shall allow the same to be so freed and discharged, and shall cause an entry to be made in the register of securities of the said security being discharged, and shall on request redeliver to the company the several deeds or instruments to which such security relates, and which were delivered to the registrar for registration under the provisions in that behalf contained in 'the principal Act,' and such entry shall be conclusive evidence of such discharge." That is in the case

of redemption. Therefore, the Legislature seems clearly to have indicated there the case in which the deeds are to be redelivered. I can see no way of getting over the latter part of sect. 10.

DAVEY, L.J.:—

I am of the same opinion. Mr. *Joyce*, in opening this case, very properly said that he raised no question of form, and if in any form of proceeding the order now under appeal could be made, Mr. *Joyce* said his clients did not object to the order. But I am of opinion that there is no form of proceeding under which the order could be made. The Registrar is a public officer and has public duties, and the only jurisdiction the Court would have over him would be to enforce either by mandamus or otherwise the performance by him of that which it was his duty to do. Now, I ask, reading this Act, where is the duty in the Registrar to hand over these securities to the receiver? I do not understand that either in the receiver's affidavit or in Mr. *Farwell's* argument it was put forward that there was any such duty on the part of the Registrar. The highest that is put in the affidavit, or I think in Mr. *Farwell's* argument, was that it would be extremely convenient, and that it is usual in cases like this, where there is no such Act of Parliament and the documents are not entrusted to a public officer, to hand over public documents to the receiver. Now, the Act is very peculiarly framed, because those who framed it had never contemplated the possibility of the company being wound up. They had not even, I gather, contemplated the possibility of a mortgagee desiring or finding it necessary to realize his security by exercising his power of sale, and accordingly there are no express provisions in the Act relating to those states of circumstances. I think that, inasmuch as the existence of that very ordinary and well-known state of circumstances must conceivably have been within the contemplation of the Legislature, whatever can be found by necessary implication (and I use the words deliberately) to apply to such a case ought to be applied to it, although it is not expressed in the Act. In sect. 46, for example, although it does not in terms contemplate the realization of the security by sale, I think it must be taken that the mortgagee might realize his security by

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the exercise of the power of sale; and, in that event, I think, although there is no express provision for it, it necessarily follows from the provisions of the Act that the deeds which would no longer be the deeds of the company or of the mortgagor, but have become by exercise of the power of sale the property of the purchaser, ought to be delivered up to the purchaser; and I should have no difficulty in making an order on the Registrar that he should deliver up the deeds relating to a property which has been sold under the exercise of a power of sale to the purchaser from the company. But I am not at all disposed to imply any powers or any directions in the Act for delivery up of the deeds where the implication of such powers or directions is not necessary for effecting the purpose of the Act; and where Mr. *Farwell* wholly failed to satisfy my mind was that the delivery of these deeds was necessary for the purpose of enabling the receiver or liquidator, or whoever the officer may be, to realize these securities which are held by the company. On the contrary, I can see a great convenience in securities of this large value remaining in the custody of a public officer in a safe place, and, in my opinion, the protection of the debenture-holders, which was the primary cause, and must be conceived to be the principal object of the Legislature in directing those deeds to be deposited with the Registrar, is still required, and just as much required after the winding-up as before the winding-up, until the securities are realized or the debenture-holders are paid off. It may, as Mr. *Farwell* suggests, occasion some additional expense; but I am quite satisfied we ought not to make this order unless we can find something in the Act which authorizes and makes it the duty of the Registrar to hand over the deeds in the way asked for.

Solicitors: *The Solicitor to the Treasury; Ashurst, Morris, Crisp & Co.; R. C. Ponsonby.*

M. W.

In re GLORY PAPER MILLS COMPANY.

DUNSTER'S CASE.

[0062 of 1894.]

C. A.
1894
VAUGHAN WILLIAMS, J.
July 18.
C. A.
Aug. 9.

Company—Winding-up—Contributory—Partnership—Signature of Memorandum by one Partner—Separate Application for Shares by Firm—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 23.

D., a member of a firm, signed the memorandum of association of a company in his own name for 100 shares, which were the qualification of a director, and he was appointed one of the first directors. The firm had been acting as agents in the formation of the company, and were desirous of being appointed agents of the company. It was accordingly agreed between the directors and the firm that the firm should take 100 fully paid-up shares, and should be appointed agents of the company at a commission. The firm signed an application for the shares, and they were allotted to them and paid up by them.

The company did not call upon *D.* to take 100 shares in his own name, but treated the shares allotted to the firm as satisfying his signature to the memorandum, and as his qualification as a director. Nearly seven years afterwards the company was wound up, and the liquidator put *D.'s* name on the list of contributories for 100 shares in addition to the shares held by the firm:—

Held (reversing the decision of *Vaughan Williams*, J.), that there was only one agreement for taking 100 shares, and that *D.'s* signature to the memorandum of association and the firm's application for shares were in performance of the same agreement; and consequently that the allotment of shares to the firm was a satisfaction of *D.'s* signature of the memorandum, and also of his qualification as a director. His name was therefore removed from the list of contributories.

THE *Glory Paper Mills Company, Limited*, was registered on the 3rd of May, 1887, under the *Companies Acts*, 1862 to 1883, the capital being £50,000 in 4000 preference shares of £10 each, and 1000 deferred shares of £10 each.

The memorandum of association of the company was dated the 2nd of May, 1887, and was signed by seven persons, amongst whom was *T. M. Dunster*, who signed for 100 preference shares. He was a partner in the firm of *Dunster & Wakefield*, and it was alleged that the firm had at this time agreed to undertake the agency of the company, and that *Dunster* really signed the memorandum as representing his firm, because the Registrar of

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Joint Stock Companies insisted on accepting the names of individuals only as signatories of the memorandum.

Dunster also signed the articles of association. He was named as one of the first directors in the articles, which provided that the qualification of a director should be the holding of shares of the nominal amount of £1000 at the least; and that the office of a director should be vacated if a director should cease to hold his qualification shares, or should not acquire the same within three months after appointment; but that a director might act before acquiring his qualification shares.

Dunster did not make any further application in his own name for shares; but on the 17th of May, 1887, he signed in the name of his firm and sent to the company the following form of application addressed to the directors:—

"Gentlemen,—Having paid to the company's bankers the sum of £1000, 100 preference shares of £10 each in the above company, I request you to allot me that number of shares upon the terms of the prospectus dated May 5th, 1887, and subject to the memorandum and articles of association of the company, and I hereby agree to accept the said shares or any smaller number that may be allotted me, and to become a member of the company in respect thereof, and I authorize you to place my name upon the register of shareholders for the number of shares so allotted to me."

(Signed) "*Dunster & Wakefield.*"

The £1000 was paid by the firm; the 100 shares were allotted to them on the 24th of May, 1887, and they were placed on the register accordingly.

On the 27th of June, 1887, *Dunster & Wakefield* wrote to the directors of the company as follows: "Gentlemen,—We will undertake the agency of the *Glory Paper Mills Company, Limited*, for 2½ per cent. commission on the gross amounts, and all paper to come through us, and we invoice the paper in our names, and we will if wanted make advances on paper sent up at 5 per cent. per annum."

These terms were accepted on the 15th of July, with some additional stipulations. No shares were ever allotted to *Dunster* individually.

The company filed its own petition for winding-up on the 19th of February, 1894, and on the 8th of March, 1894, an order was made for a compulsory winding-up.

The Official Receiver and Liquidator placed the name of *Dunster* on the list of contributories for 100 shares. *Dunster* took out a summons to have his name removed from the list. The summons was adjourned into Court, and heard before Mr. Justice *Vaughan Williams* on the 18th of July, 1894.

Affidavits by *Dunster* and by other directors, and the secretary of the company, stated that when *Dunster & Wakefield* agreed to become agents for the company, in or about May, 1887, it was agreed that the firm should take, and pay up in full, 100 shares, in consideration of the firm having the agency of the company, with a commission of 2½ per cent. on the gross amounts; that the firm was to be entitled to the shares and to pay for the same in full on allotment; that in pursuance of such agreement *Dunster* signed the memorandum of association in his own name, it being understood that the memorandum must be signed by individuals and not by firms; that in order to carry out such agreement it was considered necessary for *Dunster* to fill up an application form, and that he should do so in the name of the firm, so that the shares might be allotted in the name of the firm; that the sole reason why the application was signed by *Dunster* in the name of the firm was to have the shares allotted to the firm and not to himself individually; that the memorandum of association and application for shares formed one transaction only, and not two applications by *Dunster* and the firm each for 100 shares; that the above facts were fully known to all the company's directors and officials, and had always been acquiesced in by the company; and that no application had been made to *Dunster* to take or pay for 100 shares in his own name.

Buckley, Q.C., and *Method*, for the summons:—

There was only one contract. The Registrar of Joint Stock Companies will not accept the name of a firm as a signatory, so *Dunster* signed the memorandum of association; but the agreement was that the firm should take the shares. The firm's

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application for shares was unnecessary, and did not authorize the company to allot two sets of shares. The question is as to the intention of the parties, and it is answered by the conduct of the company, who never asked *Dunster* to take shares on his own account. The only contract was that the firm should have the agency, and should take 100 shares; and the allotment was a compliance with the terms of the contract. The company was no loser by the name of the firm being registered, for it had *Dunster* as a member, with full liability, joint and several, for the 100 shares, and it had his partner as well; therefore *Dunster* ought not to be on the list: *In re Freen & Co.* (1); *Gilman's Case* (2); *Nokes' Case* (3). If the company were in a position to allot shares to *Dunster*, and did not do so, they could not allot to him after so much delay: *Ramsgate Victoria Hotel Company* v. *Montefiore* (4).

Farwell, Q.C., and *E. S. Ford*, for the liquidator:—

In *Nokes' Case*, which is really in our favour, there was no separate application for shares by the firm. There is nothing to shew that the application by the firm was in consideration of a previous agreement; it was unconditional, and did not refer to the agency. There was no agreement before the letter of the 27th of June, and that does not mention an agreement to take shares; therefore the name of the firm was properly placed on the register. *Dunster*, by signing the memorandum of association, became unconditionally liable under sect. 23 of the *Companies Act*, 1862, and was properly placed on the list: *Evans' Case* (5); *Migotti's Case* (6). There is no evidence that the application by the firm had anything to do with the signature of the memorandum. Delay is no answer to sect. 23.

Buckley, in reply.

VAUGHAN WILLIAMS, J.:—

I do not think that I ought to assent to this application to remove the name of Mr. *Dunster* from the list of contributories.

(1) 15 W. R. 166.
(2) 31 Ch. D. 420.
(3) 16 W. R. 413, 1135.
(4) Law Rep. 1 Ex. 109.
(5) Ibid. 2 Ch. 427.
(6) Ibid. 4 Eq. 238.

I should be very sorry if I thought that there was any injustice done in this case, and that the Court had no means of putting the injustice right. But I do not think myself that on the facts of this case there is any injustice. This company was being promoted, and it seemed good either to Mr. *Dunster* or to his firm of *Dunster & Wakefield* to give their support to the proposed company by signing the memorandum of association for 100 shares. I daresay the Registrar of Joint Stock Companies will not accept the signature of a firm as a proper signing by one of seven persons of a memorandum of association as required by the statute; and I am very far from saying that he is not right in so doing. But under the circumstances Mr. *Dunster* alone signed the memorandum; and, having signed the memorandum, the 23rd section of the Act of 1862 provides what his liability shall be. The section says: "the subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered as members on the register of members hereinafter mentioned." It seems to me, therefore, beyond a doubt that Mr. *Dunster*, individually, the moment he signed the memorandum, must be "deemed to have agreed to become" a member of the company, and his name ought forthwith to have been entered as a member on the "register of members hereinafter mentioned." Mr. *Dunster* was a director, and it seems to me that he failed in his duty in not immediately putting himself on the register in respect of the 100 shares as to which he had signed the memorandum.

It is said that when this signing of the memorandum of association took place Mr. *Dunster* was acting on behalf of his firm. It seems to me that, however much that may have been arranged between him and the other members of the firm, and however much it may have been communicated to the directors subsequently, it cannot possibly affect the liability of Mr. *Dunster*, who forthwith became a member of the company and ought to have had his name entered on the register.

In this state of things the directors of the company and Messrs. *Dunster & Wakefield* were minded apparently, if they could, to

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transfer the liability of Mr. *Dunster* to his firm. It is quite true that Mr. *Dunster*, as a member of his firm, would be jointly and severally liable in respect of membership, but that does not seem to me to be the same thing as the liability he incurred by signing the memorandum of association, and one has only to point out one instance in which the liabilities and advantages would be different to shew that it is not the same thing to put an individual's name on the register as it is to put on it the name of his firm. The rights of set-off would be obviously different, and, although in fact in the present case it made no difference, it is impossible for me as a matter of law to say that the statutory obligation on Mr. *Dunster* under sect. 23 was satisfied by the name of his firm being placed on the register. The directors seem to have thought that it would be satisfied in this way; but they evidently had some misgivings in the matter, for, instead of putting the name of the firm on the register without any further application than the signing of the memorandum, they received and entertained the application of the 17th of May from Messrs. *Dunster & Wakefield* and allotted to them 100 shares. That application was unconditional. Not only was the application unconditional, but there was an allotment, and the resolution for allotment was unconditional also: it included these 100 shares amongst 1800 shares allotted to the firm and to other persons; and therefore both application and allotment were unconditional. Having regard to certain dates which were mentioned to me appearing in the minute-book, I cannot help thinking that what partly made Messrs. *Dunster & Wakefield* think it desirable to make the application of the 17th of May was that at that time they had not been formally appointed the agents of the company, and were anxious to get the appointment. But, be that as it may, there was a complete contract by the firm to take the shares—an unconditional application and an unconditional allotment, which could not satisfy and did not satisfy the obligation incurred by Mr. *Dunster* when he signed the memorandum. I am asked, now that the company is in liquidation, to say that the obligation is not binding on Mr. *Dunster* because of the understanding between him and the directors. I ought not to attend to that at all. It may well be

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that on both sides it was thought that the unconditional allotment to the firm on their unconditional application would be a satisfaction of the individual liability of Mr. *Dunster*; but they were wrong; and if they meant to make the allotment conditional they ought to have said so.

As to the authorities, I need only refer to *Nokes' Case* (1), and that was a wholly different point, because there there was no separate application at all. *Nokes* applied on behalf of his firm and had the allotment made partly to himself and partly to the firm, and it was held that it ought to have been made to him alone, but that there had been no application by the firm, and therefore that, there being no contract with the firm, the fact of their being on the register did not make them members of the company. Although the 23rd section imposes immediately on the subscribers of the memorandum the position and liability of members, the section proceeds as follows: "and every other person who has agreed to become a member of a company under this Act, and whose name is entered on the register of members, shall be deemed to be a member of the company." In *Nokes' Case* the firm had not agreed to become members. In my opinion, the firm of *Dunster & Wakefield* clearly did agree to become members, and the application must be refused with costs.

F. E.

C. A.

From this decision *Dunster* appealed. The appeal was heard on the 9th of August, 1894.

Buckley, Q.C., and *Methold*, for the Appellant, referred to *Gilman's Case* (2). They were stopped by the Court.

Farwell, Q.C., and *E. S. Ford*, for the company, cited *Nokes' Case*; *Evans' Case* (3); *Drummond's Case* (4).

LINDLEY, L.J.:—

I think that the learned Judge has not come to a right conclusion in this case. The real question is whether there was one

(1) 16 W. R. 413, 1135.
(2) 31 Ch. D. 420.
(3) Law Rep. 2 Ch. 427.
(4) Ibid. 4 Ch. 772, 781.

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agreement to take shares or two. At the first blush, it looked as if there were two agreements; but it is plain from the evidence that the signing of the memorandum by *Dunster* was in performance of the arrangement that his firm should be the agents of the company, and that his subsequent application on behalf of the firm for 100 shares was part of the same arrangement. The documents might have supported two agreements, but the evidence is all in favour of there being only one. How, then, does the matter stand in point of law? *Dunster* was bound to take 100 shares, and he asked that they should be put in the name of himself and his partner. Why should he be fixed with 200 shares? None of the parties understood that there were to be two agreements; and that is the true solution of this case.

Then with respect to the qualification. I do not feel any difficulty on this point. The articles say that the qualification of a director shall be the holding of 100 shares, and a director may act before he gets them. Mr. *Dunster* did hold the 100 shares, and there is nothing which requires him to hold them in his own name alone. If the company choose to take the extra responsibility of his partner that does not matter. The real question is reduced to one of fact. Was there one agreement to take 100 shares, or was there an agreement to take 200 shares? My opinion is that there was only one agreement for 100 shares, which Mr. *Dunster* has taken and which are fully paid up. Consequently Mr. *Dunster's* name must be removed from the list in respect of the additional 100 shares.

LOPES, L.J.:—

I am of the same opinion. I agree in the last observation of my Brother *Lindley*, that this really is a question of fact. What was, in point of fact, the true state of the case? There were two partners. What is the inference proper to be drawn from the facts? *Dunster & Wakefield* were paper manufacturers, and it appears that *Dunster*, one of the partners, had signed the memorandum of association for 100 shares. I think there is no doubt about that; but under what circumstances did he do that? He wished and he intended only to sign in the name of the firm; he was told that it was not right to sign the memorandum of

association in the name of the firm, and thereupon he signed it in his own name, meaning thereby, "I sign this in my own name, but I sign it as a member of the firm." Subsequently the company was formed, and then that is done which seems to me to be a work of supererogation: an application was sent in, in the name of the firm, for 100 shares. It is said that this was a separate and independent agreement from the former, and that *Dunster* ought to be on the register for 100 shares, and the firm on the register for another 100 shares. In my opinion, that is wrong. There were only 100 shares taken. What is afterwards done is simply the performance of the original contract. There was no intention from first to last to take 200 shares. The true meaning of the transaction was that 100 shares were to be taken, and no more.

With regard to the qualification, there also, I think there is no difficulty. *Dunster* held 100 shares, and *Dunster* was qualified to be a director. I think, therefore, this appeal must be allowed.

DAVEY, L.J.:—

In my opinion, we should be doing a piece of injustice if we affirmed this order. We should be imposing a liability on this gentleman which neither he nor any other party to the transaction ever intended or dreamt of his entering into. If we are to believe the statements made on oath, not only by Mr. *Dunster* himself but by several other witnesses, not one of whom has been cross-examined, there can be no manner of question that there was one contract, and one contract alone, and that when *Dunster* signed the memorandum of association he did so with the intention of carrying out that informal arrangement—informal because it was not binding at that time on the company—that his firm was to take 100 shares in this company. The company, for aught I know to the contrary, might have insisted on Mr. *Dunster* himself being put on the register, but they did not. The application that was made in the name of the firm of *Dunster & Wakefield* is proved, to my mind, most clearly to have been made for the mere purpose of carrying into effect a piece of machinery which would formally get the shares into the name of *Dunster & Wakefield*; and, in my opinion, it would be an outrage to hold

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that there were two sets of 100 shares in this case, and we should be acting contrary to the intention of everybody connected with the transaction. Nor do I think that the documents which are relied on by the Respondents, when properly understood, are in the least degree inconsistent with this. In June they appear to have put into writing the terms on which these gentlemen were to act, and to have settled the terms which were not, for aught I know, fixed at that time. But that is not in the least inconsistent with *Dunster* having signed the memorandum or with his firm having taken these shares in pursuance of an arrangement with the promoters before the incorporation, that they should be agents of the company; and the company we are told, in fact, employed them as agents from the time when the company was incorporated.

I am, therefore, of opinion that there was only one contract in this case, and that was a contract by Mr. *Dunster* to take 100 shares. It is proved that he entered into that contract on behalf of his firm just as if he had signed the memorandum on behalf of himself and *Wakefield*, and it is, to my mind, proved that the application in the name of *Dunster & Wakefield* for 100 shares was only made in pursuance of and for the purpose of carrying out that obligation.

I entirely agree with Lord Justice *Lindley* that a man is none the less a holder of 100 shares because the company has the additional advantage of having another person joined with him, both of those joint holders being jointly and severally liable to the company. I am of opinion, therefore, that this order ought to be discharged, and that Mr. *Dunster's* name ought to be removed from the register, with costs both here and below.

Solicitors: *Blachford, Riches & Co.; Goldring & Bell.*

M. W.

WIGRAM *v.* BUCKLEY.

[1892 W. 2171.]

C. A.
1894
CHITTY, J.
May 1.
C. A.
July 13.
Aug. 10.

Lis Pendens—Registration—Personal Estate—Assignment of Choses in Action—Book Debts—Appointment of Receiver—Judgments Act, 1839 (2 & 3 *Vict. c.* 11), *s.* 7—*Laches.*

The doctrine of *lis pendens* does not apply to personal property other than chattel interests in land.

A firm of traders assigned their book debts to the Plaintiffs, who gave no notice of the assignment to the debtors. The Plaintiffs brought an action against the firm to enforce their security, which they registered as a *lis pendens*, and obtained an injunction and a receiver; but no notice of the action was given to the debtors. The firm then assigned the same book debts to a banking company, who gave notice of their security to the debtors. The banking company had no notice of the action or of the order for an injunction and a receiver, unless the registration of the *lis pendens* amounted to constructive notice:—

Held (reversing the decision of *Chitty*, J.), that the banking company were not affected with notice by the registration of the *lis pendens*, and that their security had priority over that of the Plaintiffs.

Semble also, that, even if the registration had given the banking company notice of the *lis pendens*, the Plaintiffs would have lost their priority by their *laches*.

By an indenture dated the 2nd of December, 1885, the Defendants, *M. J. C. Buckley*, *A. S. Thomson*, and *S. H. Gifford*, who were dealers in art manufactures, assigned to the Plaintiffs, the Rev. *S. N. Wigram* and *J. J. Eyre*, the goodwill of their business and all book and other debts then due and owing, or which during the existence of the security should become due and owing, to the Defendants on account of their business, and also certain policies of life assurance by way of mortgage, for securing the repayment of certain sums of money advanced and to be advanced by the Plaintiffs with interest. This mortgage contained a power to get in the debts.

On the 28th of June, 1892, the Plaintiffs commenced an action in order (*inter alia*) to recover the money due to them on their security and for a foreclosure or sale. On the 1st of July, 1892, the Plaintiffs registered this action as a *lis pendens*, and on the

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29th of July, 1892, they applied for and obtained an order, by consent, appointing a receiver of the book and other debts comprised in the above-mentioned security; and the Defendants were restrained from carrying out a certain agreement which they had recently made for the sale of their business and book debts to a limited company, and from selling or disposing of any share or interest in the businesses or any of the property belonging to the business, otherwise than in the usual course of such business, in contravention of the covenants contained in the Plaintiffs' mortgage of December, 1885.

No notice was ever given to the debtors of the Defendants of the Plaintiffs' security, or of the action, or of the injunction, or of the appointment of a receiver.

In 1893, the Defendants made three assignments for value and by way of security to the *London Banking Corporation* of a number of debts comprised in the Plaintiffs' security. Notice of these assignments was at once given by the banking corporation to the various debtors whose debts were so assigned. The corporation had no notice of the Plaintiffs' security, nor of the action, nor of its registration as a *lis pendens*, nor of the order appointing a receiver and granting an injunction, unless the registration of the *lis pendens* amounted to constructive notice.

On the 28th of November, 1893, the banking corporation obtained judgment against the Defendants for the amount due from them to the banking corporation. After this and not before—viz., on the 30th of November, 1893—the receiver took possession and claimed the debts. Thereupon the banking corporation took out a summons for liberty to get in the debts assigned to them, and for a declaration that they had priority over the Plaintiffs in their charge on the book debts.

The summons was heard before Mr. Justice *Chitty* on the 1st of May, 1894.

Horace Kent, for the Applicants, contended that the doctrine of *lis pendens* did not apply to personal estate, and that as they were the first to give notice to the debtors, they had priority over the Plaintiffs. He referred to the statute 2 & 3 Vict. c. 11, s. 7.

Levett, Q.C., and *Rowden*, for the Plaintiffs, relied on the registration of the *lis pendens*; they cited *Berry* v. *Gibbons* (1); *Bull* v. *Hutchens* (2); *Wigney* v. *Wigney* (3); *Elphinstone* and *Clark* on Searches (4).

Ward Coldridge, for the trustee in the Defendants' bankruptcy.

H. Kent, in reply.

CHITTY, J.:—

The Applicants come to the Court *pro interesse suo*, and their case is that they cannot proceed to take possession of their property by reason of the Court having appointed a receiver at the suit of the Plaintiffs in the present action. The subject-matter which they claim consists of book debts which were assigned to them either absolutely or by way of mortgage. About that there is a contest, but that is immaterial.

The Plaintiffs, by deed in 1885, took a mortgage of book debts due and to accrue due, and in respect of that mortgage they took a vested equitable assignment by way of mortgage of book debts or *choses in action*, being a property which ranges itself under the head of personal property or personal estate. Having instituted this action, the Plaintiffs moved for and obtained an order appointing a receiver, and also an injunction restraining the Defendants, through whom the Applicants claim, from dealing with, amongst other things, the book debts; and there is no question that the order appointing the receiver and the injunction apply to the book debts in question. The Plaintiffs registered this suit as a *lis pendens* under the Act 2 & 3 Vict. c. 11, s. 7. The Applicants' deeds were all executed after the appointment of the receiver and the granting of an injunction, and after the registration of the suit as a *lis pendens*. They had advanced their money in good faith, and they had no notice in the strict sense in which that term is used of the Plaintiffs' claim. The receiver had not, at the time when they took their assignment, given notice to the debtors to pay the debts to him. These are the

(1) Law Rep. 8 Ch. 747.
(2) 32 Beav. 615, 618.
(3) 7 P. D. 228.
(4) Page 91.

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main facts, and the Applicants' case is that, notwithstanding the order appointing the receiver and the injunction, and notwithstanding the registration of the suit as a *lis pendens*, the Applicants' title ought to prevail in this action as against the Plaintiffs. The main point raised on behalf of the Applicants by their counsel is that the doctrine of *lis pendens* does not apply to personalty. It is said, and though I have not made any special research for the purposes of this judgment, I will accept the proposition as coming from counsel that the decisions in no case affirm the application of the doctrine that I am considering to the case of personalty, and undoubtedly most of the decisions in the nature of things would be decisions relating to land or realty. Now, the doctrine of *lis pendens* applies not to every suit, but to a suit the object of which is to recover or to assert title to specific property; and I cannot conceive for this purpose any distinction between an action to recover land or to recover property which according to law or equity can be though personal estate specifically recovered. I put the case during the argument of special chattels—a case in which the doctrine of equity applies in regard to specific performance. I put also the present case, which is a suit specifically asserting a right in respect of the book debts in question and to recover the book debts. Such a suit as this is a suit to which the common doctrine of *lis pendens* applies. Now, as Lord *Cranworth* explained in the well-known case of *Bellamy* v. *Sabine* (1), the doctrine is not properly represented as a doctrine of notice. He says it is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, although undoubtedly the language of the Courts often so describes its operation. It affects it not because it amounts to notice, but because the law does not allow litigant parties to give to others pending the litigation rights over the property in dispute so as to prejudice the opposite party. And there is a statement very much to the same effect by Lord Justice *Turner* in the same case. That I take to be the true principle, and I can see no distinction in the application of that principle to the different classes of property called real estate and personal estate. Lord *Romilly*

(1) 1 De G. & J. 566, 578.

considered that he had this point before him in *Berry* v. *Gibbons* (1), and he stated an opinion in regard to the doctrine which was not an opinion he had formed then for the first time, but was one which he had, as he says, always entertained. His judgment runs, so far as I need quote it, as follows (2): "I have no doubt whatever about this case. The doctrine of *lis pendens* would be worth nothing at all if when the suit is registered the application of that doctrine is to be excluded on the ground that the parties do not actually know of the suit, or that the doctrine only applies to real estate. I have always thought, and I still think, the Act respecting *lis pendens* a very beneficial Act, for it was extremely mischievous that purchasers should be affected by a suit the existence of which they had no means of knowing; but now if a purchaser or assignee does not search for *lis pendens* it is his own fault." That case came before the Court of Appeal, and the Court of Appeal, not in any way dissenting from those propositions and from the law as laid down by Lord *Romilly*, reversed his actual decision; but upon another ground, which was that the suit was one to which the doctrine of *lis pendens* did not apply. An administration decree had been made, no receiver had been appointed, and no injunction had been granted; but the executrix had dealt with part of the testator's property over which she had a legal dominion, and she pledged or mortgaged a picture of some value to a bank which had no notice of the suit. But the point upon which the Court of Appeal went was that the doctrine of *lis pendens* had no bearing on the case. I now quote the words of Lord Justice *James* (3): "For a mere administration decree, no receiver having been appointed, nor any injunction granted to prevent the executrix from dealing with the assets, would not take away her legal powers so as to invalidate the title of persons claiming under a disposition made by her in exercise of those powers." There would have been a different decision by the Court of Appeal if that action had been an action for the recovery of the picture, and there had been a receiver appointed of the picture, and an injunction granted against, say, the executrix or any other person

(1) Law Rep. 8 Ch. 747. (2) Law Rep. 8 Ch. 749, n.
(3) Law Rep. 8 Ch. 750.

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to restrain the dealing with the picture. Such a suit would have been a suit which does fall within the doctrine in question. The judgment of the present Lord Justice *Kay* in *Price* v. *Price* (1) is to the same effect; but I think it unnecessary to pursue the question further. In my judgment, the authorities and the reasoning and the plain principle to be deduced from them, and the proper limits of the doctrine of *lis pendens*, all justify me in the conclusion at which I have arrived, which is that where specific property is sought to be affected by the suit, it is immaterial whether the specific property is land or realty or goods, or *choses in action*, or, in other words, personalty. That being so, there being really no other question in the case, it seems to me that the application fails.

It would be a strange thing if the Court, after having granted an injunction to restrain a dealing with the specific property, were to entertain an application in the suit itself, made for the purpose of enforcing an assign's title where the assignment is in contravention of the direct order of the Court itself. It was urged that the statute for the protection of purchasers against the doctrine of *lis pendens* (2 & 3 Vict. c. 11) applied to real estate only, and the language of the 7th section was referred to where the term used is "estate"—the person whose estate is intended to be affected thereby. If it had been right to say that "estate" there means real estate, then the result is that this statute, introduced for the protection of purchasers, mortgagees, and others, has not relieved them in the case of personalty from the old doctrine of *lis pendens*, and consequently persons who claim have to face that doctrine in all its original severity—that is, putting it generally, that all Her Majesty's subjects are bound to take cognizance, at their own peril, of what is passing in Her Majesty's Courts of Justice with reference to specific property. But I think that construction would leave the purchasers of personal estate—and personal estate is largely dealt with at the present day—in an unfortunate position. I think all that argument, that the 7th section is confined to real estate, is one which I ought not to adopt. No doubt the term "estate," used with reference to a man, would refer to property in which he could

(1) 35 Ch. D. 297.

have an estate in the strict and technical sense of the term—that is to say, an estate in land or other realty. But I am not satisfied that the Legislature intended to use the word "estate" in so narrow a sense, and to protect purchasers of real estate only, leaving purchasers of personal estate, as I have said, without the protection which it was thought just to afford to purchasers of real estate. And there is a ground for saying that the narrow construction of the word "estate" is not the proper one, afforded by the Legislature itself in the subsequent Act of 1867 (30 & 31 Vict. c. 47).

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That Act was passed to confer jurisdiction upon the Court to order the vacation and the vacating of the registration of a *lis pendens*—a statute which was found to be urgently required by reason of some cases which had occurred shortly before the statute was passed. Consequently the plaintiffs, by registering suits and not prosecuting them *bonâ fide*, would hamper the defendants in the dealings with their property. The language to which I have referred as assisting in a reasonably large interpretation of the word "estate" is the commencement of the enacting part of the 2nd section, which speaks of the Court before whom the "property" sought to be bound is in "litigation"; and the term "property" is a wide term, quite sufficient to include personal estate. It seems as if the Legislature, in the use of that term, had put an interpretation on the word "estate" in the 7th section which would not confine it to realty, but would leave it to operate so as to include personalty also. In the present case it is not absolutely necessary for me to decide that the term "estate" in the 7th section includes personal estate; but I express my opinion that it does, and that the purchasers of personal estate are intended to have the same protection as is granted to those of real estate.

G. M.

From this decision the *London Banking Corporation* appealed. The appeal was heard on the 13th of July, 1894.

C. A.

Horace Kent, for the Appellants:—

The Appellants were the first to give notice to the debtors, and they are entitled to priority over the Plaintiffs. The receiver

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had not entered into possession of the business, and neither the Appellants nor the debtors had notice of his appointment. The only defence which the Plaintiffs have against the claim of the Appellants is that their action was registered as a *lis pendens*. But there is no authority for the proposition that the registration of a *lis pendens* has any effect upon the title to personal property —all the authorities respecting *lis pendens* relate to real estate: *Price* v. *Price* (1); *Worsley* v. *Earl of Scarborough* (2); *Ex parte Thornton* (3); *Bellamy* v. *Sabine* (4). And this is the opinion of the text-writers. There is no mention of the registration of a *lis pendens* in *Williams* on Personal Property. It is true that the statutes respecting registration do not expressly mention land, but they must be read with reference to the law as it was then understood: 2 & 3 Vict. c. 11, s. 7; 23 & 24 Vict. c. 115, s. 2; 30 & 31 Vict. c. 47. The only case in which there is any trace of a contrary opinion is in *Berry* v. *Gibbons* (5); but in that case the decision of Lord *Romilly*, M.R., was reversed by the Court of Appeal. It would be most inconvenient and embarrassing to persons engaged in commerce if it were necessary to search for a *lis pendens* whenever there was any transfer of debts or shares or other *choses in action*. The appointment of a receiver made no difference in the Appellants' rights; the receiver was not in possession, nor had the Appellants any notice of his appointment. If there was any interference with the receiver, the Defendants were to blame, not the Appellants. The *laches* of the Plaintiffs in not giving notice of their charge and enforcing their rights is in itself sufficient to destroy their priority.

Levett, Q.C., and *Rowden*, for the Plaintiffs:—

It is well established that a Court of Equity will not allow *choses in action*, which are only assignable in equity, to be dealt with while the title to them is being contested in an action. This is independent of any law as to the effect of a *lis pendens* on the title to land: *Ward* v. *Duncombe* (6); *Bellamy* v. *Sabine*; *Bishop of Winchester* v. *Paine* (7); *Metcalfe* v. *Pulvertoft* (8); *Bull*

(1) 35 Ch. D. 297.
(2) 3 Atk. 392.
(3) Law Rep. 2 Ch. 171.
(4) 1 De G. & J. 566.
(5) Law Rep. 8 Ch. 747, 749, n.
(6) [1893] A. C. 369.
(7) 11 Ves. 194.
(8) 2 V. & B. 200.

v. *Hutchens* (1); *Berry* v. *Gibbons* (2). In the last-mentioned case Lord *Romilly* held that the doctrine of *lis pendens* was applicable to personal estate; and, although it is true that his judgment was reversed by the Court of Appeal, it was reversed on a different ground, and the Court did not express disapproval of his opinion as to that particular point. In the present case a receiver had been appointed, and it would have been a contempt of Court for the Plaintiffs to interfere with his possession of the debts.

With respect to the inconvenience of holding that a *lis pendens* affects the title to chattels, we only contend that it applies to specific chattels. Text-writers advise purchasers of sums in Court to search for a *lis pendens*: *Elphinstone* and *Clark* on Searches (3).

H. Kent, in reply.

1894. Aug. 10. LINDLEY, L.J., delivered his judgment, in which he stated that the Lord Chancellor, Lord *Herschell*, concurred.

After stating the facts as set forth above, his Lordship continued as follows:—

It was not disputed that if the Plaintiffs' action had not been registered as a *lis pendens*, and if there had been no injunction or receiver, the banking corporation, having no notice of the Plaintiffs' title, would have acquired a better title than the Plaintiffs to the debts assigned to them, although they were comprised in the Plaintiffs' earlier security. This was conceded on the authority of *Dearle* v. *Hall* (4), and is not open to controversy. But the Plaintiffs contended, and the learned Judge held, that, as the debts were the subject of an action to recover them, and such action was registered as a *lis pendens* and a receiver of those debts had been appointed, and the Defendants had been restrained from dealing with them, the title of the Defendants could not be allowed to prevail over that of the Plaintiffs. The doctrine involved in this decision is very far-reaching and is of great practical importance to business men,

(1) 32 Beav. 615.
(2) Law Rep. 8 Ch. 747, 749, n.
(3) Page 91.
(4) 3 Russ. 1.

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and it requires very careful examination. For the reasons which I will state, I am clearly of opinion that the doctrine is unsound and cannot be supported. I will first consider the effect of the registration of the Plaintiffs' action as a *lis pendens*, and I will then consider the effect of the order for an injunction and a receiver.

In *Sorrell* v. *Carpenter* (1) the Lord Chancellor said: "Where there is a conveyance made *pendente lite* . . . even though the alienation be for never so good a consideration, yet if made *pendente lite*, the purchase is to be set aside; and this in imitation of the proceedings in a real action at common law, where, if the defendant aliens after the pendency of the writ, the judgment in the real action will over-reach such alienation. But where there is a real and fair purchaser without any notice, it is a very hard case, especially in a Court of Equity, to set such purchase aside." The judgment in a real action, if in favour of the demandant, was that he recover seisin of the land, and the writ of execution upon it was a writ of *habere facias seisinam*, which directed the sheriff to cause the demandant to have seisin of the lands which he had recovered (see *Roscoe* on Real Actions (2); *Com.* Dig. Execution (3)).

There were no similar judgments or writs in actions at common law to recover goods and chattels. Even in detinue the defendant could, before the *Common Law Procedure Act*, keep the chattel he had got on paying its value to the sheriff. It is true that the goods which a defendant had at the date of the writ of execution could be taken even from a subsequent purchaser, unless in market overt (see *Com.* Dig. Execution (4)); but this is a very different matter. So far, therefore, as goods and chattels are concerned, the doctrine that no title could be made to them by an unsuccessful defendant pending litigation for their recovery had no foundation in common law, and, if the rule was different in equity, such rule cannot be based on the principle that equity follows the law. Any such doctrine would, if logically carried out, practically greatly embarrass ordinary trade and be, to say the least, highly inconvenient to every one

(1) 2 P. Wms. 482, 483.
(2) Pages 328, &c., and 341.
(3) A. 2.
(4) D. 2.

except plaintiffs claiming goods. If the doctrine of *lis pendens* were applicable to personal property generally, bankers and others could not safely make advances on ships or goods and that which represents them in commerce—*e.g.*, bills of lading, dock warrants, wharfinger's receipts—nor upon stock and share certificates, nor upon debentures or policies, nor even on negotiable securities, without making searches in the Judgment Registry Office. Such a doctrine would paralyse the trade of the country, and there is no warrant for it either in the statutes relating to *lis pendens* nor in the decisions of the Courts.

The first statute on the subject is 2 & 3 Vict. c. 11, s. 7. The language of this statute shews that the Legislature was dealing with "estates"—*i.e.*, land and land only. It is true that in the amending Act 30 & 31 Vict. c. 47, s. 2, the word "property" is used instead of "estate"; but this variation in language by no means warrants the inference that the Legislature was altering the law by extending the effect of registration to ordinary goods and chattels. Nor has it ever been so understood.

Reliance was placed on *Bellamy* v. *Sabine* (1); but that was a case of real estate, and there is no ground for supposing that the observations made in that case were intended to apply to personal property. Similar remarks apply to the instructive judgments in *Bishop of Winchester* v. *Paine* (2) and *Metcalfe* v. *Pulvertoft* (3). Again, reliance was placed on the practice of conveyancers who advise purchasers and mortgagees of personal estate to search the *lis pendens* registry. This is intelligible and reasonable enough. Conveyancers advise on abstracts of title, and always try and keep their clients out of difficulties and possible litigation. If an abstract of title to personalty is laid before a conveyancer, he naturally advises an intending purchaser or mortgagee to make such inquiries as experience shews to be prudent in order to avoid trouble and vexation in future. There is no case in the books which warrants the notion that the doctrine of *lis pendens* applies to personal property other than leasehold property. It is true that Lord *Romilly* in *Berry* v.

(1) 1 De G. & J. 566.
(2) 11 Ves. 197.
(3) 2 V. & B. 200.

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Gibbons (1) decided that the doctrine applied as well to goods and chattels as to land; but his decision was reversed on appeal, and there is nothing in the judgment of the Court of Appeal which justifies the inference that the Court of Appeal shared his opinion. The Court of Appeal gave an excellent reason for their decision—viz., that the registration of an administration suit as a *lis pendens* did not prevent an executor from disposing of the assets and conferring a good title to them. It was unnecessary to say or decide more. This was not the first case in which the Court of Appeal differed from the view taken by Lord *Romilly* of the effect of registering a proceeding as a *lis pendens*. In *Ex parte Thornton* (2) a winding-up petition was registered as a *lis pendens* against a contributory, and Lord *Romilly* refused to set aside the registration. But on appeal the then Lords Justices *Turner* and *Cairns* reversed his decision, and it is impossible not to see from their judgments that they considered that the registration of the petition affected land only, and in that case the land of the company sought to be wound up. Lord *Cairns* (3) points out that sect. 153 of the *Companies Act*, 1862, expressly makes void alienations of a company's real and personal estate after a winding-up petition is presented, and he says distinctly that sect. 114—the *lis pendens* section—has no reference to personal estate at all.

Upon principle and authority I am of opinion that the doctrine in question is inapplicable to personal property other than chattel interests in land. The inconvenience of extending the doctrine to ordinary personal property is so extremely serious that it would, in my opinion, be very wrong so to extend it now for the first time, even if such extension could be justified by reasoning from well-established general propositions which might serve as premises for arriving at such a conclusion.

But then it is said that in this case there was not only a registered *lis pendens*, but an injunction and a receiver. But of these the present claimants had no notice whatever when they advanced their money and obtained and perfected their security. Their title is in no way affected by those orders, nor have the

(1) Law Rep. 8 Ch. 749, n. (2) Law Rep. 2 Ch. 171.
(3) Law Rep. 2 Ch. 179.

Applicants, the bank, been guilty of any contempt of Court. The case would have been different if the bank had had notice of the order appointing the receiver or granting the injunction, or even if the receiver had given notice to the debtors to pay their debts to him. Such a notice would have been equivalent to notice by the Plaintiffs of the assignment to them.

Lastly, I am of opinion that, in addition to all other grounds, the *laches* of the Plaintiffs disentitles them from invoking the aid of the Court against the bank. The Plaintiffs gave the debtors whose debts were assigned to them no notice of the assignment, nor of the action, nor of the injunction, nor of the appointment of the receiver. They left the Defendants to carry on their business and deal with the debts owing to them as if no assignment of them had been made. The action was not prosecuted with diligence; no step was taken in it between July, 1892, and the end of November, 1893; by which time the bank had not only acquired and perfected their title, but had obtained judgment and sought to enforce it. This *laches* alone is fatal to the Plaintiffs' case, and would be so even if the doctrine of *lis pendens* could be invoked by them: see *Drew* v. *Earl of Norbury* (1); *Sugden's* Vendors and Purchasers (2). The appeal must be allowed, with costs here and below.

DAVEY, L.J.:—

It is admitted that there is no recorded decision in the Court of Chancery or in this Court in which the doctrine of *lis pendens* has been applied to the title to a chattel or *chose in action* so as to postpone a person taking *pendente lite* without notice who, but for the existence of the action, would have a good title against the plaintiff if the case of *Berry* v. *Gibbons* (3), before Lord *Romilly*, be excepted. The foundation of the doctrine has been said to be by analogy to what was done in real actions. If so, there is a *primâ facie* presumption that the doctrine was applicable to real estate only. There can, undoubtedly, be found in the judgments of very eminent Judges of the Court of Chancery statements of the doctrine which are in terms general and equally applicable

(1) 3 J. & Lat. 267. (2) 14th Ed. p. 758.
(3) Law Rep. 8 Ch. 747.

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to personal estate as real estate. Vice-Chancellor *Plumer's* judgment in *Metcalfe* v. *Pulvertoft* (1) is as good an example as any, and the maxim *pendente lite nihil innovetur* has been more than once cited. But it will be found on examination that such expressions of opinion, although general in terms, have been invariably made in cases dealing with real estate alone, and may, therefore, be interpreted as having reference to real estate only. The language of sects. 4 and 7 of 2 & 3 Vict. c. 11, providing for registration of *lis pendens* and the re-registration thereof is, in my opinion, favourable to the inference that the provisions of those sections were considered to apply to real estate only. And it is impossible to read the judgments of Lord Justice *Turner* and Lord *Cairns* in *Ex parte Thornton* (2), without coming to the conclusion that those learned Judges treated the registration of *lis pendens* as affecting real estate only, and, indeed, Lord *Cairns* expressly says so on p. 179 of the report, although, as the particular question was not then under discussion, his words cannot be regarded as a decision. Great weight must, of course, be given to the opinion of a learned and experienced Judge like Lord *Romilly*. But his decision on the case before him was overruled on other grounds; and I cannot agree with Mr. Justice *Chitty* in holding that the Court of Appeal, because they found other sufficient grounds for differing from Lord *Romilly's* judgment and did not expressly dissent from his view of the law, must be taken to have given it the weight of their authority. In this state of the authorities I am of opinion that the Court of Appeal is at liberty to say and must say whether they will apply the doctrine to a case like the present affecting the title to *choses in action*, and in coming to a decision on that point the Court ought to have regard to the effect of such an application on the business and dealings of mankind. This very case is as good an illustration as another. A man claiming to be mortgagee of the present and future book debts of a firm commences an action to enforce his mortgage, obtains by consent the appointment of a receiver and an injunction to restrain the Defendants dealing with the book debts, and does nothing more. Neither the Plaintiffs nor the receiver give any notice to the debtors

(1) 2 V. & B. 200. (2) Law Rep. 2 Ch. 171.

from whom the book debts are due which are left in the order and disposition (to borrow an expression from the bankruptcy law) of the Defendants. A year afterwards the Defendants assign certain book debts (some of which were not even due at the date of the commencement of the action) to the Applicants, who, without any notice of the Plaintiffs' claim, complete their title by giving notice to the debtors. It is said that they ought to be postponed to the Plaintiffs, because the latter on the 1st of July, 1892, registered the action as a *lis pendens*. Is it reasonable, or in accordance with the habits of business people, to expect persons who deal in shares of joint stock companies, bills of exchange, bills of lading, book debts, and other similar property, to search the register of *lis pendens* before concluding any contract of sale or mortgage at the risk of losing their money if the property in question is the subject of an action or of an order for an injunction or a receiver? Suppose an action to enforce a trust against the legal registered holder of shares in a railway company. He sells them, in breach perhaps of an injunction, and another person (probably not the immediate purchaser from him) takes a transfer. Would it be right or just to hold that transferee subject to whatever equitable rights may ultimately be established in the action? Could the multifarious business of life be carried on on such terms? Real estate and leaseholds stand on a different footing, because they are the subject of title, and no prudent person in this country deals with them without at least some investigation of title. And this is known and recognised amongst business people.

It may be said that the Applicants derive title through the breach of an injunction by the Defendants. Be it so; and in that case the Defendants, who have set at defiance the order of the Court, will richly deserve the severest treatment the Court can deal out to them. But how does this affect the Applicants, who are not bound by the order, and have no notice of it? I remember the warning of Lord *Nottingham* in the *Duke of Norfolk's Case* (1): "Pray let us so resolve cases here, that they may stand with the reason of mankind, when they are debated abroad."

(1) 3 Ch. Cas. 33.

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Not, then, finding any decision in the history of the Court which binds me to decide against the Appellants, and being of opinion that so to decide would not "stand with the reason of mankind," I think that this appeal ought to be allowed. I think that the *laches* of the Plaintiffs in prosecuting their action, and acting on the order for a receiver which they obtained, would in the present case be sufficient grounds for not postponing the Appellants to their claims; but I have preferred to take the larger and higher ground.

Solicitors: *T. Edwards*; *Lindsay, Greenfield, & Masons; Mason, Phillips, & Cotton.*

M. W.

C. A. 1894 *Aug.* 6, 7, 10.

MINTER *v.* CARR.

[1893 M. 947.]

Mortgage—Consolidation—Assignment of Equity of Redemption prior to Union of Mortgages.

J. B. was the owner of two properties, *A* and *B*. In February, 1864, he mortgaged *A* to *C. S.*; and in July, 1864, he gave a second mortgage on it to *W. S.*

In 1863, 1865, and 1866, he mortgaged *B* to other mortgagees, and in 1871 and 1873 the first mortgages on both properties were transferred to *R.*

In 1884 *J. B.* mortgaged both properties to the Plaintiff, and in 1885 he mortgaged both properties to *P.*, subject to the prior incumbrances.

In July, 1890, *W. S.'s* second mortgage of *A.* was transferred to *P.*, who, in October, 1890, sold it under his power of sale to the Plaintiff, subject only to the mortgage to *C. S.*:—

Held (affirming the decision of *Romer*, J.), that as the union of the first mortgages on the two properties in *R.* had not taken place until after the equity of redemption in *A* had been assigned to *W. S.*, the executors of *R.* could not consolidate the first mortgages so as to prevent the Plaintiff from redeeming *A* alone.

Vint v. *Padget* (1) considered.

THIS was an appeal from a judgment of Mr. Justice *Romer* (2).

The facts, which are fully stated in the previous report, were shortly as follows:—

James Banks mortgaged two leasehold houses, Nos. 1 & 2,

(1) 2 De G. & J. 611. (2) [1894] 2 Ch, 321.

Shakespeare Terrace, Folkestone, called in the argument "property A," by deeds dated the 4th of February, 1864, to *Charles Sedgwick*, to secure two sums of £500 each, and in 1863, 1865, and 1866 he also mortgaged other houses, called "property B," to other mortgagees.

On the 12th of July, 1864, before the above-mentioned mortgages got into the hands of the same mortgagees, *Banks* mortgaged property A, subject to the mortgage to *Sedgwick*, to *W. Stunt*.

In the years 1871 and 1873 *Sedgwick's* mortgage on property A and the mortgages on property B were transferred to *R. T. Brockman*, of whom the Defendants were the personal representatives.

On the 3rd of October, 1884, *Banks* mortgaged both properties A and B to the Plaintiff, subject to the prior mortgages thereon, and in 1885 mortgaged both properties to *Pledge*, subject to prior incumbrances.

On the 14th of July, 1890, *Stunt's* second mortgage on property A was transferred to *J. Pledge*, who on the 8th of October, 1890, in execution of his power of sale, sold and conveyed property A to the Plaintiff *John Minter*, subject to the mortgage to *Sedgwick*, but free from all other incumbrances.

On the 30th of March, 1893, the Plaintiff brought the present action against *Brockman's* personal representatives for the redemption of property A, and the Defendants claimed in their defence the right to consolidate their mortgages on the two properties A and B.

Mr. Justice *Romer* refused to admit the Defendants' claim to consolidate the mortgages, and gave judgment for redemption of *Sedgwick's* mortgage on property A. The Defendants appealed from this decision.

The appeal came on to be heard on the 6th of August, 1894. The arguments were similar to those in the Court below.

Neville, Q.C., and *E. Ward*, for the Appellants, cited *Vint* v. *Padget* (1); *Harter* v. *Colman* (2); *Tweedale* v. *Tweedale* (3); *Jennings* v. *Jordan* (4).

(1) 2 De G. & J. 611.
(2) 19 Ch. D. 630.
(3) 23 Beav. 341.
(4) 6 App. Cas. 698.

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Bramwell Davis, for the Plaintiff, referred to *Smithett* v. *Hesketh* (1); *Miln* v. *Walton* (2); *Adams* v. *Angell* (3); *Bird* v. *Wenn* (4); *In re Pride* (5); *White* v. *Hillacre* (6).

E. Ward, in reply.

1894. Aug. 10. LINDLEY, L.J. (who stated that Lord *Herschell*, L.C., concurred in the judgment he was about to deliver):—

This case is reported in [1894] 2 Ch. 321, where the material facts are stated. They are complicated, but the question raised by the appeal is simple. The Defendants are first mortgagees of several properties. The Plaintiff is entitled to redeem all these properties. He derives his title through *Pledge*, who was himself entitled to redeem them all. The Plaintiff seeks to redeem only one of those properties, viz., 1 & 2, *Shakespeare Terrace*, on payment of the sum for which alone it was originally mortgaged. The Defendants contend that they are entitled to consolidate all their mortgages as against the Plaintiff, and the Defendants rely on *Vint* v. *Padget* (7) as an authority in their favour.

The Plaintiff's answer to this is twofold. First, he says *Vint* v. *Padget* has been virtually overruled by *Jennings* v. *Jordan* (8) and *Harter* v. *Colman* (9). Secondly, he says that before *Pledge* sold to him, he, *Pledge*, paid off and obtained a transfer of a second mortgage (*Stunt's*) on the property which the Plaintiff desires to redeem, viz., 1 & 2, *Shakespeare Terrace*, and that, although *Pledge* had a right to redeem all the properties when he got in *Stunt's* second mortgage, *Pledge* had and the Plaintiff still has the same right to redeem that property as *Stunt* himself originally had. Mr. Justice *Romer* has held that the Plaintiff has this right, and that the Defendants are not entitled to resist redemption of this property unless all their mortgages are paid off.

(1) 44 Ch. D. 161.
(2) 2 Y. & C. Ch. 354.
(3) 5 Ch. D. 634.
(4) 33 Ch. D. 215.
(5) [1891] 2 Ch. 135.
(6) 3 Y. & C. Ex. 597.
(7) 2 De G. & J. 611.
(8) 6 App. Cas. 698.
(9) 19 Ch. D. 630.

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The equitable rule which allows a mortgagee of several properties belonging to the same mortgagor to consolidate them against him is founded in good sense. It is fair and just that a secured creditor should say to his debtor who is in default, and has not paid his debts as agreed, "You shall not deprive me of any of my securities without paying me all that is due to me on them." To extend this doctrine to persons claiming under the mortgagor after a right to consolidate has arisen against him is also intelligible, if they have notice of the right to consolidate, but it is not so obvious where they have not. The assignee of an equitable right stands, however, in no better position than his assignor, and this accounts for a still further extension of the original doctrine. But to extend the doctrine still further to a case like *Vint* v. *Padget* (1), where the purchaser of two properties knew they were subject to mortgages created by the vendor, but which mortgages were not in the hands of the same mortgagee when the purchase was made, was, I think, to make an extension very difficult to justify; and I certainly am not prepared to carry the decision in that case further than I am compelled.

The Defendants clearly had no right to consolidate against *Stunt*, and his mortgage was not extinguished when he was paid off, but was assigned as a subsisting security to *Pledge*, who afterwards sold 1 & 2, *Shakespeare Terrace* to the Plaintiff. *Pledge* was at that time entitled to redeem all the properties mortgaged to the Defendants. Now, if *Pledge* could not keep *Stunt's* mortgage alive as against other incumbrancers, so as to avail himself of *Stunt's* right to redeem, it would follow that the Defendants would be entitled to consolidate their mortgages against *Pledge*, and therefore against the Plaintiff. But the case of *Adams* v. *Angell* (2) shews that there is no rule of law which compels the Court to hold that *Pledge* could not keep *Stunt's* mortgage alive as against other incumbrancers; and if so, and if the case turns on the intention of *Pledge*, I have no doubt that he intended to keep *Stunt's* mortgage alive, and that he in fact did so. Consequently, I think he might have availed himself of *Stunt's* rights to redeem 1 & 2, *Shakespeare Terrace*

(1) 2 De G. & J. 611. (2) 5 Ch. D. 634.

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alone. If *Pledge* could do this, so can the Plaintiff. The Defendants suffer no more loss by being so redeemed by *Pledge* or by the Plaintiff than if they had been redeemed by *Stunt*. To deny *Pledge's* or the Plaintiff's right to redeem, as *Stunt* could have redeemed, would in my opinion be extending the doctrine of consolidation beyond what is reasonable, and beyond even *Vint* v. *Padget* (1), and this ought not to be done. Even if, therefore, *Vint* v. *Padget* is to be regarded as still a binding authority, I am of opinion that the judgment appealed from should be affirmed, and the appeal be dismissed with costs.

DAVEY, L.J.:—

I agree in the judgment of the Court which has been delivered by the Lord Justice. I am not prepared to extend the doctrine of consolidation beyond the extent to which it has been already carried; and I think that to accede to the Appellants' argument in the present case would be an extension of that doctrine. It is clear that the Appellants are in no respect prejudiced by *Pledge* having taken a transfer of *Stunt's* interest in the property, and having sold to the Plaintiff under *Stunt's* power of sale. *Pledge* was only doing what *Stunt* might have done; and, if the Appellants derived any advantage, it would have only been by an accident, to the benefit of which they have no claim.

I only desire to say that I do not quite share the Lord Justice's doubts as to *Vint* v. *Padget*. As at present advised, I think that case may be supported on sound principles; but it is unnecessary for us to deal with *Vint* v. *Padget* in this case, as, even assuming that case to have been rightly decided, we have come to the unanimous conclusion that the appeal fails.

Solicitors: *A. R. & H. Steele*, agents for *J. Minter, Folkestone*; *Talbot & Tasker*.

(1) 2 De G. & J. 611.

M. W.

In re DANIELL'S SETTLED ESTATES.

C. A. 1894 Aug. 10.

[1894 D. 1092.]

Settled Land Acts—Building Lease—Agreement to lay out a Specific Sum in Repairs—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 8, *sub-s.* 1, *s.* 63; *Settled Land Act*, 1884 (47 & 48 *Vict. c.* 18), *s.* 7.

A lease made partly in consideration of the lessee agreeing to expend a specific sum of money in doing the improvements and repairs specified in a schedule is a building lease within the meaning of the *Settled Land Act*, 1882, s. 8, sub-s. 1.

The Court, in the exercise of its discretion under the *Settled Land Act*, 1884, s. 7, will not sanction a building lease in which the repairs or improvements agreed to be done by the lessee are such as an ordinary landlord is expected to do.

THIS was an application under the *Settled Land Acts*, 1882 and 1884, to obtain the sanction of the Court to a proposed lease of a house included in a settlement.

The Applicant, Mrs. *Daniell*, was entitled for her life to the income of the settled estates subject to a trust for sale, and was, therefore, under sect. 63 of the *Settled Land Act*, 1882, and sect. 8 of the *Settled Land Act*, 1884, empowered to make a building lease of the house, subject to the sanction of the Court.

The lease, as proposed, was expressed to be made by Mrs. *Daniell* as tenant for life under the settlement, and she thereby granted to *T. Dick*, belting and boot and shoe manufacturer, a messuage in *Holborn* for thirty years at a rent of £350 for the first five years, and of £382 for the remainder of the term: and the lessee contracted, among other things, to execute and complete within three months, to the satisfaction of the lessor, at an expense of not less than £200, the repairs and improvements to the demised premises specified in the schedule thereto, and also during the term to repair and maintain the messuage and buildings and all additions thereto. The works mentioned in the schedule comprised rebuilding a stack of chimneys and other substantial repairs to the roof and framework of the building. Mr. Justice *North*, to whom the application was made by Mrs. *Daniell*, held that he had no jurisdiction

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to sanction the lease, holding that it was not a building lease within the 8th section of the *Settled Land Act*, 1882.

Mrs. *Daniell* appealed from this decision.

Howard Wright, for the Appellant:—

The proposed lease is within the regulations respecting a building lease in sect. 8, sub-sect. 1, of the *Settled Land Act*, 1882 (1). The terms of that clause are wider than those of the definition of a building lease in the *Conveyancing Act*, 1881, sect. 2 (x.), which says building leases include the erecting and improving of and the adding to and the repairing of buildings, and a building lease is a lease for building purposes or purposes connected therewith. There is no reason for restricting the definition of a building lease to one in which the lessee is bound to repair or improve to any extent that may be necessary; an agreement to do the works specified in a schedule, and to a limited expense, is fairly within the terms. The Court, therefore, has jurisdiction to sanction this lease; and our evidence shews that the lease now proposed is a beneficial one.

H. Fellows, for the trustees, left the question in the hands of the Court.

LINDLEY, L.J.:—

I am of opinion that the Court has jurisdiction to sanction the lease in this case. The *Settled Land Act*, 1882, s. 8, sub-s. 1, gives this rule respecting a building lease. [His Lordship read the clause set forth above.]

I think it would be putting too narrow a construction on the clause to confine the words "agreeing to improve or repair buildings" to an agreement to expend generally whatever money may be required for improving or repairing, and not to include

(1) 45 & 46 Vict. c. 38, s. 8, sub-s. 1: "Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorized by this Act, for or in connexion with building purposes."

an agreement to lay out a fixed sum in improvements and repairs.

But the Legislature has entrusted the Court with a discretion in the matter, and, in the exercise of that discretion, I see no reason for sanctioning this lease. The tenant for life has a large income, and can easily do these slight repairs at her own expense. Why should we sanction a lease for nine years longer than the ordinary term in order to save her from the expense of doing them? It would be a bad precedent to approve of such a lease: if we did so, no tenant for life would in future expend anything in repairing or improving the settled property.

LOPES, L.J.:—

I am of the same opinion. I think the Court has jurisdiction to sanction this lease, which cannot be made without the sanction of the Court. It is a building lease within the meaning of the Act, as the tenant undertakes to lay out a substantial sum on the improvement and repair of the house. But I think it is one which the Court ought not to sanction. The tenant for life has a large income, and the repairs are such as a landlord is usually expected to do. The lease is not a satisfactory one for the benefit of all parties interested.

DAVEY, L.J.:—

I am of the same opinion.

Solicitors: *Freshfields & Williams; Rooper & Whately.*

M. W.

CHITTY, J.
1894
July 25, 26.

In re ISAACS.
ISAACS *v.* REGINALL.

[1894 I. 884.]

Option to Purchase—Conversion—Intestacy—Heir-at-Law or Legal Personal Representative.

The principle of *Lawes* v. *Bennett* (1) applies to an intestacy, even though the option to purchase is exercisable only after the death of the grantor.

Emuss v. *Smith* (2), explained.

Adjourned summons.

Isaac Isaacs, being seised in fee of certain premises known as No. 3, *Nevill Street, Abergavenny*, demised the same, by an indenture of lease of the 13th of August, 1880, to one *Thomas Arthur Cadle*, his heirs and assigns, for the life of the said *Isaac Isaacs*, at a yearly rent of £40. The lease contained a provision that after the decease of the said *Isaac Isaacs* the said *Thomas Arthur Cadle*, his heirs or assigns, should have the right and option of purchasing the premises thereby demised at the price of £750, such option to be declared in writing within six months from the time of the decease of the said *Isaac Isaacs*.

On the 9th of January, 1894, *Isaac Isaacs* died intestate, and letters of administration to his personal estate were granted to the Plaintiff *Charles Isaacs*. The Defendant *R. M. Reginall* was the heir-at-law.

On the 25th of April, 1894, *Thomas Arthur Cadle* sent formal notice in writing to the heir-at-law and legal personal representative of the late *Isaac Isaacs* of his intention to exercise his option to purchase the premises comprised in the said lease. The intestate's estate was more than sufficient for the payment of his debts and funeral expenses.

The question now submitted to the Court was, whether the purchase-money, £750, belonged to the Plaintiff as the legal personal representative of *Isaac Isaacs*, or to the Defendant as the heir-at-law.

(1) 1 Cox, 167. (2) 2 De G. & Sm. 722.

Byrne, Q.C., and *Solomon*, for the Plaintiff:—

By the exercise of the option to purchase the property is converted, as between the real and legal personal representatives, when notice is given; consequently this purchase-money forms part of the personal estate of the intestate. This case is within the principle of *Lawes* v. *Bennett* (1), which was followed by Lord *Eldon* in *Townley* v. *Bedwell* (2), and again by *Wood*, V.C., in *Weeding* v. *Weeding* (3), and by *Kindersley*, V.C., in *Collingwood* v. *Row* (4). The principle laid down by *Lawes* v. *Bennett* was accepted as still binding in *In re Adams and Kensington Vestry* (5). On these authorities we contend that the Plaintiff is entitled to this £750.

Farwell, Q.C., and *R. B. Phillpotts*, for the Defendant:—

The principle of *Lawes* v. *Bennett* and the cases following it is that the conversion relates back to the earliest possible moment, *i.e.*, the date of the contract giving the option; it is not to be left to the volition of a third person, the lessee, whether it shall be real or personal estate, until after the death of the grantor of the option. The interest of the intestate, at his death, was an estate in land, subject to a power in the lessee to substitute purchase-money for it, and this is the interest that devolved on the heir-at-law.

The reasoning in *Lawes* v. *Bennett* is not altogether satisfactory, and Lord *Eldon* himself says a great deal may be urged against it; it may be an authority in parallel cases, but the principle is not to be extended.

[*Byrne*, Q.C., referred to *Ripley* v. *Waterworth* (6), where Lord *Eldon* comments on *Lawes* v. *Bennett*.]

The principle of *Lawes* v. *Bennett* was not followed in *Emuss* v. *Smith* (7) or in *Edwards* v. *West* (8), and has never been applied to the case of an intestacy, nor to a case where the option was exercisable only after the death of the grantor. On

(1) 1 Cox, 167.
(2) 14 Ves. 590.
(3) 1 J. & H. 424.
(4) 26 L. J. (Ch.) 649.
(5) 27 Ch. D. 394.
(6) 7 Ves. 425, 436.
(7) 2 De G. & Sm. 722.
(8) 7 Ch. D. 858.

CHITTY, J. 1894 *In re* ISAACS. ISAACS *v.* REGINALL.

these grounds the present case is distinguishable from *Lawes* v. *Bennett* (1), and the Defendant is entitled to the purchase-money as heir-at-law.

Byrne, in reply.

CHITTY, J. (after shortly stating the facts, continued):—

The question now is whether the heir is entitled to the purchase-money of £750, paid by virtue of the exercise of the option, or the administrator; in other words, whether, after the exercise of the option, this property is to go as part of the real or part of the personal estate of the intestate.

It appears to me that the case is covered by the well-known authority of *Lawes* v. *Bennett*, a case which has been approved of and followed in numerous subsequent authorities. It may be open to question whether *Lawes* v. *Bennett* could not have been decided otherwise than it was; but the question, decided nearly a century ago, has stood the test of time, and stands as a land-mark upon this subject. The option in *Lawes* v. *Bennett* was exercised after the death of the person who granted it, and Lord *Kenyon*, who decided the case, was aware of what he terms a possible difficulty: "the only possible difficulty in this case is, that it is left to the election of *Douglas* whether it shall be real or personal. It seems to me to make no distinction at all"; nor did he think that there was any distinction in the lapse of time that occurred after the death and before the option was exercised. Lord *Eldon*, who argued that case, made observations on it in a case of *Ripley* v. *Waterworth* (2), which was cited in argument, but which I need not further refer to; he also had a similar case before him in *Townley* v. *Bedwell* (3), and what he said in reference to *Lawes* v. *Bennett* was (4): "That case was very much argued; and I do not mean to say, that a great deal may not be urged against it: but, where there is a decision precisely in point, it is better to follow it"; and so he followed it. But there was a question who was entitled to the rents that had accrued after the testator's death and

(1) 1 Cox, 167, 171.
(2) 7 Ves. 436.
(3) 14 Ves. 590.
(4) Ibid. 596.

before the exercise of the option, and he held that the rents went to the heir; in other words, that it was a conversion, by virtue of the contract, of the testator's real estate into personal estate, as between his real representative and his p ersonal representative, but that the conversion operated for all purposes only from the time when the option itself was exercised. That was necessarily the principle of his decision, because he held that the rents went to the heir.

Now, a similar point came before Vice-Chancellor *Kindersley* in *Collingwood* v. *Row* (1), and he followed *Lawes* v. *Bennett* (2), and also before Vice-Chancellor *Wood* in *Weeding* v. *Weeding* (3). That was a case of a will where there was a devise of specific estate, and a bequest of personal estate, and subsequently a contract by which the testator gave an option to purchase which was exercised after his death; and the Vice-Chanc ellor held, following *Lawes* v. *Bennett*, that the property was converted, not, as is argued by Mr. *Farwell* and Mr. *Phillpotts*, from the date of the contract, but from the date of the exercise of the option, and, consequently, that the purchase-money went, not to the devisee, but to the residuary legatee. That was the case of a will.

I am told that *Lawes* v. *Bennett* has never been applied to the case of an intestacy, and that I ought not to extend the doctrine of *Lawes* v. *Bennett*. The argument really means that I ought not to apply *Lawes* v. *Bennett*; but, notwithstanding any subsequent case, it appears to me to apply, without any possible limitation or qualification, to the case of an intestacy. In *Weeding* v. *Weeding* there was no intention (of course, the testator could have manifested it on the face of his will) that the purchase-money derivable from, and payable under, the option w hich he subsequently granted, should go to the person to whom he gave the real estate, which was the subject-matter of the contrac t. The Vice-Chancellor (4) deals with the case thus: "Then what indication have you, on the will, of the quality which the testa tor intended this property to possess? He only says, 'I wish *A*. to take what is land, and *B*. to take what is money.'" Consequ ently, there

(1) 26 L. J. (Ch.) 649.
(2) 1 Cox, 167.
(3) 1 J. & H. 424.
(4) Ibid. 430.

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was no intention in that case, as was said by counsel who were arguing for the heir, which rendered *Lawes* v. *Bennett* (1) inapplicable to the circumstances. That case appears to me, if any authority is wanted besides *Lawes* v. *Bennett* itself (which I do not think is the case), to shew that *Lawes* v. *Bennett* does apply even to intestacy, because it did apply to a will where there was no intention manifested one way or the other on the face of the will.

Then the case of *Emuss* v. *Smith* (2) was cited. There the option was exercisable only after the death of the person granting it, and that circumstance is relied on for the heir here, as ground for my not applying in this case the doctrine of *Lawes* v. *Bennett*. But *Emuss* v. *Smith* is only a case of ascertaining the testator's intention. It is plain that a man may, either before or after his will, have given an option to somebody, which would have the effect of converting his realty into personalty, as between his real and personal representatives, but may shew, on the face of his will, an intention that the devisee of the land should take all the testator's interest in the land, including the purchase-money which would arise from exercising the option, and that is the explanation, if explanation be required, of *Emuss* v. *Smith*. The Vice-Chancellor said (3): "As the case stands, taking together the particular language of the will, and the particular language and the nature of the contract, upon which no option was expressed during the life of the testator, coupled with the fact of the re-publication by the codicil, I am of opinion, that it is consistent with the true construction of the testator's testamentary instruments, and the effect that ought to be given to re-publication,—that it is consistent with law and justice, and reason, and consistent also with the cases of *Lawes* v. *Bennett* and *Knollys* v. *Shepherd* (4), to say, that the purchase-moneys of *Williams' Farm* and *Nash's* own farm belong to those who would have enjoyed them if Mr. *Galton* had not exercised the option of buying." It is a case which was decided entirely upon the testator's intention.

I cannot see that I should be extending *Lawes* v. *Bennett*

(1) 1 Cox, 167.
(2) 2 De G. & Sm. 722.
(3) 2 De G. & Sm. 735.
(4) 1 J. & W. 499.

if I say that that decision applies to a case where the option arises only after the death. It seems to me to be an immaterial circumstance, and I should be, under the pretence of distinguishing *Lawes* v. *Bennett* (1), declining to follow it, if I adopted this argument. In *Lawes* v. *Bennett* the option was exercisable as well before as after the death. It was, in fact, exercised after the death. I can see no substantial ground for saying that the circumstance that the option was so limited, as to be only exercisable after the death, creates a material distinction.

If I had adopted, which I do not, the principle contended for in the argument on behalf of the heir-at-law, that the decision of *Lawes* v. *Bennett*, and the subsequent cases involved this proposition, that the conversion related back to the contract, then I might have thought there was something in the distinction; but, in my opinion, that is not the result of the authorities. As I have pointed out during the course of the argument, I think the judgment in the case of *Townley* v. *Bedwell* (2) alone is a decision on the point, that the option does not operate completely to convert the property until it is exercised, because the rents in the interval after the testator's death go to the heir-at-law. The other cases cited (such as, for instance, *In re Adams and Kensington Vestry* (3)) are not in point, because the question there arose with reference to the estate of the person to whom the option was granted, and, the option being found in a lease, which was personal property in the lessee, it was held that his administrator, who was also the heir, could not exercise the option so as to convert the leasehold interest, which would devolve upon him as administrator, and for the benefit of the next of kin, into real estate, which he would have taken as heir; and, in substance, that the option and all that flowed from it was part of the lessee's personal estate.

The other case mentioned for the heir, of *Edwards* v. *West* (4), is plainly distinguishable. No doubt it was said there by Mr. Justice *Fry* that the principle of *Lawes* v. *Bennett* was not to be extended, and that an attempt was made by the argument in that case to extend it to a very considerable degree; and

(1) 1 Cox, 167.
(2) 14 Ves. 590.
(3) 27 Ch. D. 394.
(4) 7 Ch. D. 858.

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Mr. Justice *Fry* said (1) that he did not think he was at liberty to extend it (that is the doctrine in *Lawes* v. *Bennett* (2)) so as to imply that there was a conversion from the date of the contract giving the option, as between the vendor and purchaser who claimed under it. *Edwards* v. *West* (3), therefore, was a case arising between vendor and purchaser, and not a case arising between the real and personal representatives of a man who had granted the option.

For these reasons, I am of opinion that the purchase-money here forms part of the personal estate of the intestate, and, consequently, that it goes to the plaintiff as his personal representative.

Solicitors: *H. I. Coburn; Mear & Fowler.*

(1) 7 Ch. D. 863. (2) 1 Cox, 167.
(3) 7 Ch. D. 858.

W. C. D.

WEST SURREY WATER COMPANY *v.* GUARDIANS OF CHERTSEY UNION.

NORTH, J.
1894
July 11.

[1893 W. 3791.]

Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 52—*Waterworks—Supply of Water.*

A local authority may, notwithstanding sect. 52 of the *Public Health Act*, 1875, construct and use waterworks for the supply of water for their own use only in the district of a water company able and willing to supply such water.

THIS was an action to restrain the Defendants, a local authority, from constructing proposed works for supplying themselves with water for their own use, in connection with a new system of sewerage for parts of their district situated within the limits of supply of the Plaintiff water company, on the ground that the construction of the proposed works was made unlawful by the 52nd section of the *Public Health Act*, 1875.

The action was brought on, on an agreed statement of facts, to determine as matter of law whether the Defendants had the right to take and use water in the way proposed.

The following were the material facts:—

The Defendants were constructing certain works for the purpose of draining and disposing of the sewage of the parish of *Weybridge* and the special drainage district of *Oatlands*. The whole of the works were within the limits of supply of the Plaintiff company. The Defendants had constructed, as part of their sewerage works, at a place near the River *Thames*, a tank for the reception of the sewage to be dealt with, which was to flow into it by gravitation. Condensing steam-engines were also being put up by the Defendants for the purpose of pumping the sewage, to be dealt with elsewhere, and pumping water from the *Thames* into sixteen automatic flushing tanks intended to be used for cleansing the sewers. By arrangement with the *Thames* Conservators, it was intended to take water from the river both for flushing the sewers and condensing steam. The estimated

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daily amount of water required by the Defendants for both purposes was nearly 30,000 gallons.

At their sewage-disposal works the Defendants were also erecting steam-engines and a pump and making a well, and intended to use water from the well, as well as rain water, for the steam-engines and treating the sewage.

Cozens-Hardy, Q.C., and *Mulligan*, for the Plaintiffs :—

The Plaintiffs do not rely on any prohibition contained in their own Act of Parliament or in the *Waterworks Clauses Act*, except so far that the fact that they are, by the *Waterworks Clauses Act*, 1847, s. 37, under the obligation to supply water to the Defendants for purposes the works in question are constructed to fulfil makes it reasonable that the corresponding restriction imposed by the *Public Health Act*, 1875, on which the Plaintiffs do rely, should exist.

The effect of sects. 51 and 52 (together with the interpretation clause, sect. 4) of the *Public Health Act*, 1875, is to prohibit the Defendants from making waterworks and supplying water.

[NORTH, J. :—Could not the Defendants dig a well in their workhouse garden, and supply the inmates with water ?]

They probably could ; but what they are doing is in effect to construct works for the supply of water for the benefit of the public generally.

Swinfen Eady, Q.C., and *F. Gore-Browne*, for the Defendants :—

The proposed works are not "waterworks," but sewerage works. The supply of water proposed by the Defendants is not a supply to the general public in competition with the Plaintiffs, such as is aimed at by the prohibition. The Defendants do not require pure and wholesome drinking water for flushing their sewers ; they are not justified in putting their ratepayers to the cost of taking the Plaintiffs' expensive water.

Mulligan, in reply.

NORTH, J. :—

I think in the present case the Plaintiffs have mistaken their rights. [After describing the nature of the Defendants' sewerage

works, his Lordship continued:—] The Plaintiffs are the *West Surrey Water Company*, and they have legal duties in supplying water to this district, and I think that they are under the obligation, if called upon by the Defendants to do so, to supply such water as may be necessary for the purpose of flushing the sewers, just in the same way as they are liable to supply any inhabitant of the district with water for the supply of his house. But I find no corresponding obligation cast upon the persons whom the company are bound to supply with water necessarily to take water for the purpose. In fact, it is not disputed that any inhabitant of the district might, if he pleased, sink a well in his garden and put a pump into it to supply, at any rate, the needs of his own house, and I have not yet heard any reason suggested why he should not supply his neighbour if he liked—that is to say, if his neighbour were short of water, so long always as he is not establishing waterworks within the meaning of the Act.

The Plaintiffs' case rests on this, that the Defendants' works are waterworks, and that they have a monopoly of waterworks here; that the waterworks which the sanitary board have established are waterworks within the meaning of the Act, which, therefore, the board have no right to erect without first giving the option to the Plaintiffs of supplying the water that is required, which the Plaintiffs are ready and willing to supply. The answer to that is that the Defendants do require water, but they do not require the filtered article which the Plaintiffs produce and sell. It is their duty to obtain water in the cheapest way they can for the purpose of saving the rates imposed upon the ratepayers. The best thing they can do for this purpose is to take the water out of the *Thames*, and they have obtained leave to do it, and they can do it very much more cheaply than they could if they had to pay the waterworks company, who have only one set of mains for supplying water, and who are bound to supply pure, wholesome drinking water in those mains, and who, therefore, cannot possibly afford to let the Defendants have it at the same price at which the Defendants can take it for themselves in this way.

I come to the conclusion for this reason, that if the Defendants could get it more cheaply from the Plaintiffs than in the way

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the Defendants propose, it not being suggested that the Plaintiffs' water would not answer the purpose as well, I think it would be the duty of the Defendants to do so for the sake of the ratepayers. It is obvious that the expense they are incurring is because they see their way to save money to the ratepayers by adopting the course which they are adopting. The only question is whether they are infringing the rights of the Plaintiffs as to waterworks under the *Public Health Act*. It is admitted that the *Waterworks Clauses Act* and the Plaintiffs' special Act do not in any way prevent the Defendants from doing what they are now doing. The Plaintiffs' case is put upon the provisions of the *Public Health Act*, 1875, only, at which we must now look. The Act is divided into parts, and at Part III. we have a division under the head of "Sanitary Provisions." First of all, we come to the provisions relating to sewerage and drainage, extending down to the 34th section. Then under a different heading they put "privies, water-closets," &c., then "scavenging and cleansing," and so on. Then we come to the 51st section. We start a fresh topic, all included under the general head of sanitary provisions. The topic of the 51st and following sections is "water supply," the first sub-section being "power of local authority in relation to water supply." What is "supply"? "Supply" I understand to mean the passing of water from persons who have it to persons who want it. I do not see how it could be said that supply of water means supplying "yourself" in the natural meaning of the words, especially when we come to look at the particular words used in this 51st section, which I am now going to read: "Any urban authority may provide their district or any part thereof, and any rural authority may provide their district or any contributory place therein"; that is, referring to other provisions of the Act, "or any part of any such contributory place, with a supply of water proper and sufficient for public and private purposes, and for those purposes or any of them may (1.) construct and maintain waterworks, dig wells, and do any other necessary acts; and (2.) take on lease or hire any waterworks, and (with the sanction of the Local Government Board) purchase any waterworks, or any water or right to take or convey water, either within or without their district,

and any rights, powers, and privileges of any water company; and (3.) contract with any person for a supply of water." Then comes the 52nd section: "Before commencing to construct waterworks"—that means under the previous section, and the question is whether what is being done is the construction of waterworks under that previous section. In my opinion, it is not. They are not providing their district, or any contributory place therein, or any part of such contributory place, with a supply of water proper and sufficient for public and private purposes; they are only obtaining water and putting into their own sewers, which are their own property, the water necessary for the purpose of flushing those sewers; which is not supplied to anybody; but is continued through those sewers till the contents of the sewers are discharged, when the matter discharged is chemically dealt with. Therefore, so far from supplying the water to the district or contributory place, they are getting the water themselves for their own purposes, and using it for their own purposes only. No doubt, persons who use the sewers have the benefit of having the sewers purified and kept clean in this sort of way, but that is all. Then the 52nd section says: "Before commencing to construct waterworks within the limits of supply of any water company empowered by Act of Parliament or any order confirmed by Parliament to supply water, the local authority shall give written notice to every water company within whose limits of supply the local authority are desirous of supplying water, stating the purpose, for which and (as far as may be practicable) the extent to which water is required by the local authority." Those words seem to me to be very important, because they shew exactly what this is intended to effect. The sanitary authority may provide waterworks to supply water to its district. If they are lucky enough to have a pure well, with a sufficient quantity of water in it, they have nothing to do but to distribute it; otherwise they may have to take steps to procure it from a distance. But there may be a company already supplying that district, and they are not to be interfered with by a public board under the Act setting up rival works without having the chance of furnishing the supply themselves; and if they can supply what is required, they are to have the

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option of affording the supply, and waterworks are not to be constructed to interfere with the supply of water by them. The words in the section speaking of written notices being given to the water company within whose limits of supply the local authority are desirous of supplying water shew clearly that what is contemplated is a local authority proceeding to supply water in the way in which the water company was in the habit of supplying it, and they are not to poach upon the preserves of the water company if the water company can give the supply. Then, to proceed with the 52nd section: "It shall not be lawful for the local authority to construct any waterworks within such limits if and so long as any such company are able and willing to supply water proper and sufficient for all reasonable purposes for which it is required by the local authority." Then there is a provision as to settlement of any difference as to price to be charged by the local authority. Still the question remains as to what exactly "construction of waterworks" means; and, as I read these sections, they relate to waterworks for the supply of water, meaning to the persons who require the supply of water in the district, and not meaning to refer to what is merely taking water for the purposes of the body itself—for its own purposes, as distinguished from supplying it to other persons. It is not disputed that under the Act any private person may dig a well on his own land, and there pump water for his own purposes; and it is not really disputed that this sanitary board may, if they please, dig a well in the garden of the workhouse and pump water from that for the supply of the workhouse. I do not see why, if they may do that, they should not use it also for the purpose of watering their roads. How it can be said that taking it from the *Thames* for their own purposes is supplying water in the sense in which that phrase is used in the Act, I do not understand. If one looks at the interpretation clause as to what "waterworks" means, it includes "streams, springs, wells, pumps," and so on, and "engines and all machinery, lands, buildings, and things for supplying or used for supplying water," again using the same phrase. Then, looking at the subsequent sections under the head of "Water Supply," following upon the 51st and 52nd sections, the 54th section is: "Where a local authority supply

water within their district, they shall have the same powers and be subject to the same restrictions for carrying water-mains within or without their district as they have and are subject to for carrying sewers within or without their district respectively by the law for the time being in force." That is to say, they may enter upon land, and so on. Then the 55th section is an important one: "A local authority shall provide and keep in any waterworks constructed or purchased by them a supply of pure and wholesome water." And it is contended that under that the water to be used for cleansing the sewers must necessarily be of the same high class and quality as required to be supplied to householders for the purpose of domestic consumption; and I think it would be absurd to suppose that it was necessary for the Defendants here not to use for the purposes of their works any water except such pure and wholesome water, because that is what it comes to. I do not intend to go through them; but the subsequent sects. 56, and so on down to the 67th, all contain various phrases shewing what is meant by the phrase, "supplying water": that it is supplying water to the general public in the whole district, or part of the district to which it is supplied, to every one who takes it, and it has no reference to such a case as the present.

In the present case I am of opinion that there is nothing in the Act which prevents the Defendants from doing what they have done or are proposing to do.

Solicitors for Plaintiffs: *Batten, Proffitt, & Scott.*

Solicitors for Defendants: *Trinder & Capron*, agents for *Paine & Brettell, Chertsey.*

D. P.

NORTH, J.

1894

July 24.

In re PEAKE'S SETTLED ESTATES.

[1893 P. 0121.]

Settled Estate—Authority to Exercise Statutory Power of Sale—Female Trustee—Settled Estates Act, 1877 (40 & 41 *Vict. c.* 18).

Upon the hearing of a petition under the *Settled Estates Act*, 1877, asking that two ladies (respectively a widow and a spinster), the then trustees of a will, might be authorized to sell the whole or any part or parts of the estates devised, the Court in the first instance refused to confer the authority upon two ladies, and the petition was ordered to stand over generally.

Upon further evidence shewing that the petitioners had been unable to procure any other suitable persons to act as trustees, though they had endeavoured to do so, the Court made an order conferring the authority asked for on the two ladies during their joint lives, subject to the approval of the Court in the case of each sale.

PETITION under the *Settled Estates Act*, 1877, and the *Settled Land Acts*, 1882 to 1890, asking that Mrs. *Murly* (a widow) and Miss *Peake* (a spinster), the then trustees of the will of *Thomas Peake* deceased, or other the trustees for the time being of the will, might be authorized to sell for cash, or to grant at fee-farm rents, the whole or any portion or portions of an estate called the "*Tileries*," and other lands, devised by the will, with power from time to time to make proposals for separate sales, and with power also, subject to the approval of the Court in each case, to lay out any part or parts of the same estate and lands for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses.

The petition was presented by some of the beneficiaries and the two trustees, and was served upon an infant beneficiary.

Mrs. *Murly* and Miss *Peake* were daughters of the testator, and had been appointed trustees of the will since his death. Miss *Peake* was aged forty-seven; Mrs. *Murly* was older. She had no children.

When the petition first came before Mr. Justice *North* for hearing on the 29th of July, 1893, he declined to confer the authority asked for upon two ladies, and the petition was ordered

to stand over generally, with the view of finding some other suitable persons who might be willing to act as trustees (1).

The petition was now restored to the paper. There was evidence that the petitioners had endeavoured, but without success, to induce other suitable persons to act as trustees. No one but the two daughters could be found who was willing to act. There was also evidence that Miss *Peake* was a woman of exceptional business capacity, and that for several years during the latter part of her father's life, when he was paralyzed, she had signed cheques for him and managed the accounts of a large business belonging to him.

Swinfen Eady, Q.C., and *Tyssen*, for the petition.

R. F. Norton, for the Respondent.

NORTH, J.:—

The evidence now adduced, which was not before me on the former hearing, has established a very exceptional case as regards Miss *Peake*. No such exceptional case is shewn as regards Mrs. *Murly*; but the two ladies are associated as trustees of the will, and, having regard to the peculiar circumstances, I will make the order asked for, subject to this, that the authority will be given to the two ladies by name during their joint lives, and not to the trustees for the time being of the will, and that the authority to sell will be "with the sanction of the Judge in Chambers, with power from time to time to enter into contracts for such sales, subject to the approval of the Judge in each case."

Solicitors: *Cronin, Orgill, & Cronin; Field, Roscoe & Co.*

(1) *Vide* [1893] 3 Ch. 430.

W. L. C.

NORTH, J.
1894
July 25.

In re HYSLOP.
HYSLOP *v.* CHAMBERLAIN.

[1894 H. 1108.]

Administration—Executor—Debt—Evidence—Unexecuted Testamentary Document.

A testator in a letter of instructions to an executor stated that a debt from the executor was cancelled. The letter was not communicated to the debtor during the life of the testator, nor properly executed as a will:—

Held, that the letter was inadmissible as evidence of the cancellation of the debt, and that the debt was payable.

THIS was an originating summons to determine questions arising in the administration of the estate of Colonel *A. H. Hyslop*, who died in May, 1891, having made a will dated October, 1889, by which he appointed his brother-in-law, the Rev. *H. H. Chamberlain*, a Defendant to the summons, and his sister *Emma Charlotte Hyslop*, the Plaintiff to the summons, executors, and made the following bequest: "I give to my brother-in-law the sum of £500 in consideration of his undertaking to be my executor and carrying out my instructions and wishes to the best of his ability. The instructions are contained in letters addressed to him."

After the testator's death two documents addressed to the Defendant *Chamberlain* in the handwriting of the testator, not attested, were found in a tin box with his will. The second document was undated; it was headed: "General Instructions to the Rev. *H. Chamberlain*." It contained the following sentence: "The hundred pounds I lent you does not form part of the money I left you; it is cancelled." The testator had lent the Defendant *Chamberlain* £100, on which interest had been paid.

The letters of instruction to the Defendant *Chamberlain* had been filed in the Probate Division of the High Court with a view to their being proved as part of the will of the testator; but probate was refused. One question in the summons was whether the Defendant *Chamberlain* was liable to the estate for the £100 lent him by the testator.

The only other party to the summons was *Adelaide Annie Hyslop*, made a Defendant as one of the testator's next-of-kin.

Upjohn, for the Plaintiff.

Theobald, for the Defendant *Chamberlain*:—

The appointment of *Chamberlain* as executor destroys the debt at law. In equity the debt is not gone merely from that fact; but an intention of the testator to forego the debt (such as is contained in the instructions given to *Chamberlain*) will be acted upon: *Strong* v. *Bird* (1); *In re Applebee* (2).

F. Gore-Browne, for the Defendant *Annie Hyslop*:—

There was no communication of the intention of the testator to the debtor or any one else in his lifetime; the letter of instructions cannot now be acted upon.

NORTH, J.:—

I do not think I can treat the debt as being at an end. The appointment of a debtor as executor is clearly not sufficient of itself to annul his debt in equity. There may be some equity added to the appointment that is sufficient. In the case of *Strong* v. *Bird* it was found that there was. If the letter of instructions had been communicated to the debtor by the testator in his lifetime the case might have been different. I think it is quite clear that the letter was intended to be instructions to the executor as to the mode of winding up the estate—that is, it was intended to operate as a testamentary document, and was not executed in the way it ought to have been for that purpose. It was tendered to the Probate Court for proof, and proof was refused. Under the circumstances I do not think I can look at it. That being so, there is nothing to make the debt not payable, though the debtor is executor.

Solicitors for Plaintiff and Defendant *Annie Hyslop*: *Campbell, Reeves, & Hooper.*

Solicitors for Defendant *Chamberlain*: *Cunliffes & Davenport.*

(1) Law Rep. 18 Eq. 315. (2) [1891] 3 Ch. 422.

D. P.

NORTH, J. 1894 July 26, 27.

ATTORNEY-GENERAL *v.* DEAN AND CHAPTER OF CHRIST CHURCH, OXFORD.

Charity Commissioners—Jurisdiction—"Endowed School"—"Public School"—"Educational Endowment"—Endowed Schools Act, 1869 (32 & 33 *Vict. c.* 56), *ss.* 4, 5, 6, 8, 9, 24—*Endowed Schools Act*, 1873 (36 & 37 *Vict. c.* 87), *s.* 9—*Endowed Schools Act*, 1874 (37 & 38 *Vict. c.* 87), *s.* 6.

Property, producing an annual income of about £900, was held in trust, first, to pay thereout an annual stipend of £40 to the minister for the time being of a specified parish, and next in the maintenance of eighteen exhibitioners in the *College of Christ Church, Oxford*, or in any other college or colleges at *Oxford*, and then in the maintenance of an annual prize of £100. The eighteen exhibitioners were to be chosen from six schools—viz., four from *Shrewsbury*, three from *Bridgnorth*, four from *Newport*, three from *Shifnal*, two from *Wem*, and two from *Donnington*. If on any vacancy there should not be a properly qualified candidate from the school whence the vacancy ought to be supplied, the vacancy was to be filled by the election of a properly qualified candidate from any of the other schools. The annual prize was to be open to the competition equally of the scholars of all the six schools.

Shrewsbury School was a "public school" within the meaning of the *Public Schools Act*, 1868; the other five schools were "endowed schools" within the meaning of the *Endowed Schools Acts*:—

Held, that the exhibitions were "educational endowments" within the meaning of the *Endowed Schools Acts*, and that they formed part of the endowments of the six schools respectively; but that, inasmuch as *Shrewsbury School* was not solely interested in the endowment, the Charity Commissioners had jurisdiction to make a scheme for the management of the whole charity, and the jurisdiction of the High Court was entirely excluded.

SUMMONS by the relators in this suit, which was an information by the Attorney-General, commenced in 1808, at the relation of the trustees of a charity called the *Careswell* charity.

Edward Careswell, by his will dated the 3rd of February, 1689, which was established by a decree of the Court of Chancery dated the 6th of July, 1741, devised, directed, and appointed that certain lands in the county of *Salop* should be at all times for ever thereafter chargeable with the maintenance of eighteen scholars in the *College of Christ Church*, in *Oxford*, or in case the said scholars could not be incorporated with the foundation or admitted into the *Society of Christ Church*, and to have chambers

there, then in some other college or hall of the said university where the said scholars might best be accommodated, by allowing to each of the said scholars yearly, and every year for four years while he should remain an undergraduate, the sum of £18; to each of them, after he should commence Bachelor of Arts, the sum of £21 yearly for three years, until he should commence Master of Arts; and the sum of £27 yearly to each of the said scholars for three years after he should commence Master of Arts, and no longer. And the testator's will was, "that the said eighteen scholars so as aforesaid to be maintained at the said university upon their first election shall be chosen from and out of the most ingenious and deserving scholars, either natives of the said several parishes where the estate lieth or elsewhere of the said county of *Salop*, and of least ability to maintain themselves, of the said six free schools in the said county hereafter mentioned in the number and proportion and in the manner following: (viz.) four from and out of the free school at *Shrewsbury*, three from and out of the free school at *Bridgnorth*, four out of the free school at *Newport*, three out of the free school at *Shifnal*, two out of the free school of *Wem*, and two out of the free school of *Donnington*—all the said scholars to be from the said schools removed to the said *College of Christ Church*, or to some other college or hall of the said *University of Oxford* where a settlement for them can most conveniently be provided." The testator directed that, as any vacancy in such college should afterwards happen by the death or removal of any of the said scholars, or other scholars to be chosen out of the said schools, such vacancies should be supplied by a new election of one or more scholars, as the case should require, from out of the same free schools from whence the persons or person so dying or removing was or were first elected. The elections were to be made by the chief governor or master of the college where the scholars were to be resident, or someone deputed by him, and the justices of the peace inhabiting or acting in certain hundreds mentioned, or any three of them, whereof the master of the college or his delegate should be one. The testator directed that the number of scholars should be increased, if the rents of the property should increase; and if the rents should diminish,

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the election of one, two, or more of the number of scholars to be elected out of the two last-mentioned free schools should cease, until the lands should again come to be of sufficient yearly value to maintain the said eighteen scholars.

By a codicil, dated the 24th of February, 1689, the testator gave £10 a year to augment the allowance paid to the minister of the parish of *Bobbington*, to be annually deducted from the allowances appointed for the said scholars.

By the Act 48 Geo. 3, c. cxliv., the fee simple of the estates devised by the testator was vested in trustees for the charitable purposes therein mentioned.

The income arising from the land increased largely, and on the 11th of February, 1861, a scheme was approved in this suit by the Court of Chancery, regulating the administration of the scholarships or exhibitions.

The scheme provided (1.) that the entire net income of the charity property should be applied by the receiver in the cause, first, in paying to the minister of *Bobbington*, in the county of *Stafford*, for the time being, the annual stipend of £40; and next in the maintenance (subject to the subjoined regulations) of eighteen exhibitioners in the *College of Christ Church*, in the *University of Oxford*, or in any other college or colleges there, as thereinafter mentioned, and then in the maintenance (subject to the further regulations and conditions thereinafter subjoined) of an annual prize, to be called the "*Careswell* prize."

(2.) "The eighteen exhibitioners are to be chosen (subject nevertheless and except as hereinafter mentioned) out of the most ingenious and deserving scholars (either natives of the parishes in which the said charity estates lie, or elsewhere of the county of *Salop*), and of least ability to maintain themselves, from the following six free grammar schools (such scholars being either free or not free of the said schools), that is to say: four from *Shrewsbury School*; three from *Bridgnorth School*; four from *Newport School*; three from *Shifnal School*; two from *Wem School*; two from *Donnington School*."

(3.) "Any vacancy arising by the death or removal of any exhibitioner, or by effluxion of time, or by any other means, is to be supplied (subject and except as hereinafter mentioned) by

election from the same school to which the vacant exhibition shall under the last preceding article have been appropriated."

(4.) "If, on any vacancy arising as aforesaid, no candidate shall present himself from the school whence the vacancy ought to be supplied, who, being a native of *Shropshire*, shall, in the opinion of the persons by whom the candidates shall be elected, as hereinafter provided, or the majority of such electors, be sufficiently qualified in other respects to be elected to the vacant exhibition, such vacancy shall be filled up by the election of any candidate from the same school, who, whether a native of *Shropshire* or not, shall, in the opinion of the electors, or the majority of them, be sufficiently qualified in other respects to be elected to such exhibition; but if no candidate shall present himself from the same school who, whether a native of *Shropshire* or not, shall, in the opinion of the said electors, or a majority of them, be sufficiently qualified in other respects to be elected to such exhibition, then the vacancy shall be filled up by the election of a properly qualified candidate, being a native of *Shropshire*, if any such shall present himself, but if not, then being a native of any other place or country whatsoever (including any foreign country) from any of the six aforesaid schools."

(5.) "The *Careswell* prize shall (subject to the regulations hereinafter contained) be open to the competition (equally and without preference) of the scholars of all the six aforesaid schools."

By clause 9 the elections both to the prizes and the exhibitions were to be made by the dean of *Christ Church* for the time being, or his deputy appointed as therein mentioned, and any two or more of the justices of the peace inhabiting or acting within the hundreds of *Bradford*, *Stoddesdon*, and *Brimstree* for the time being who might attend the election.

By clause 13 provision was made for the exhibitions being held at colleges other than *Christ Church* in the circumstances therein mentioned.

By clause 14 the amount of the several exhibitions was fixed at £60 a year for four years, if the exhibitioner remained in residence, and did not take the degree of B.A.; from the time the exhibitioner should commence Bachelor of Arts for three

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years, if he should remain a Bachelor of Arts, he was to receive £21 a year, raiseable to £60 in certain events; and for three years from the time when he should commence Master of Arts £27 a year.

By clause 15 the *Careswell* prize was fixed at £100.

The charity had been since administered under this scheme, and trustees had been from time to time appointed by the Court.

Between 1866 and 1890, fifty-one exhibitions fell vacant, viz., eleven for *Shrewsbury School*, all of which were taken; ten for *Bridgnorth School*, one of which was taken; ten for *Newport School*, seven of which were taken; nine for *Shifnal School*, five for *Wem School*, and six for *Donnington School*, none of which were taken.

The thirty-two exhibitions not taken were thrown open, in accordance with the provisions of the scheme, and of these thirty were taken by scholars from *Shrewsbury*, and two by scholars from *Newport*.

In 1890 the Charity Commissioners, in the exercise of what they conceived to be their jurisdiction under sect. 9 of the *Endowed Schools Act*, 1869, considered it their duty to take steps for the establishment of a scheme for the reorganisation of the charity, and they accordingly entered into communication with the governors of the respective schools and with the trustees of the charity.

The trustees considered that the commissioners had no jurisdiction in the matter, and ultimately the trustees, who had been substituted as relators in place of the original relators in the suit, issued this summons asking "that, the Charity Commissioners having stated their intention to prepare a new scheme for the administration of the *Careswell* charity under the *Endowed Schools Acts*, the present trustees of the charity may be at liberty to bring in a statement of their views in reference thereto, and that directions may be given to the trustees whether they should take any, and, if so, what steps in regard to the proposal of the said Charity Commissioners to frame a scheme for the administration of the said *Careswell* charity."

After several hearings of this summons in Chambers it was

ultimately adjourned into Court for the determination of the question of jurisdiction. The Charity Commissioners were served, and they submitted to be bound by the decision of the Court, their right to appeal being preserved.

Swinfen Eady, Q.C., and *Stallard*, for the trustees:—

The Court has jurisdiction in this case, and the jurisdiction of the commissioners is excluded by sect. 8 of the *Endowed Schools Act*, 1869 (1).

(1) By sect. 4: "In this Act, unless the context otherwise requires, the term 'endowment' means every description of property, real, personal, and mixed, which is dedicated to such charitable uses as are referred to in this Act."

By sect. 5: "In this Act, unless the context otherwise requires, the term 'educational endowment' means an endowment or any part of an endowment which, or the income whereof, has been made applicable or is applied for the purposes of education at school of boys and girls or either of them, or of exhibitions tenable at a school or an university or elsewhere, whether the same has been made so applicable by the original instrument of foundation or by any subsequent Act of Parliament, letters-patent, decree, scheme, order, instrument, or other authority, and whether it has been made applicable or is applied in the shape—of payment to the governing body of any school or any member thereof, or to any teacher or officer of any school, or to any person bound to teach, or to scholars in any school, or their parents, or—of buildings, houses, or school apparatus for any school, or otherwise howsoever."

By sect. 6: "In this Act, unless the context otherwise requires, the term 'endowed school' means a school which is (or if it were not in abeyance would be) wholly or partly maintained by means of any endowment: Provided that a school belonging to any person or body corporate shall not, by reason only that exhibitions are attached to such school, be deemed to be an endowed school."

By sect. 8: "Nothing in this Act, save as in this Act expressly provided, shall apply—(1.) To any school mentioned in sect. 3 of the *Public Schools Act*, 1868, or to the endowment thereof."

[Among the schools mentioned in sect. 3 of the *Public Schools Act*, 1868, is *Shrewsbury School*].

By sect. 9: "The Commissioners (appointed as in this Act mentioned), by schemes made during the period, in the manner and subject to the provisions in this Act mentioned, shall have power, in such manner as may render any educational endowment most conducive to the advancement of the education of boys and girls, or either of them, to alter, and add to any existing, and to make new trusts directions and provisions in lieu of any existing, trusts directions and provisions which affect such endowment, and the education promoted thereby, including the consolidation of two or more such endowments, or the division of one endowment into two or more endowments."

By sect. 24: "Where part of an endowment is an educational endowment

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Sect. 24 of the Act of 1869 shews that at any rate the commissioners have no jurisdiction over that part of the endowment which is applicable to other charitable uses, and therefore the Court has jurisdiction over that part.

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within the meaning of this Act, and part of it is applicable or applied to other charitable uses, the scheme shall be in conformity with the following provisions (except so far as the governing body of such endowment assent to the scheme departing therefrom); that is to say:

"(1.) The part of the endowment or annual income derived therefrom which is applicable to such other charitable uses shall not be diverted by the scheme from such uses;

"(3.) If the proportion applicable to other charitable uses exceeds one-half of the whole of the endowment, the governing body of such endowment existing at the date of the scheme shall, so far as regards its non-educational purposes, remain unaltered by the scheme.

"(4) Where the governing body remains so unaltered, that body shall pay or apply for educational purposes such proportion as under the former provisions of this section is applicable to those purposes, or such less sum as may be fixed by the Commissioners, subject to appeal to Her Majesty in Council."

By sect. 52: "During the continuance of the power of making schemes under this Act the Charity Commissioners for England and Wales, or any Court or Judge, shall not, with respect to any educational endowment which can be dealt with by a scheme under this Act, make any scheme or appoint any new trustees without the consent of the Committee of Council on Education."

[This provision was repealed by sect. 7 of the *Endowed Schools Act*, 1874 (37 & 38 Vict. c. 87).]

By sect. 59: "The powers of making and approving of a scheme under this Act shall not, unless continued by Parliament, be exercised after the 31st of December, 1872, or such further day not later than the 31st of December, 1873, as may be appointed by Her Majesty in Council."

By the *Endowed Schools Act*, 1873 (36 & 37 Vict. c. 87)—

Sect. 9: "Where two or more schools are jointly interested in an educational endowment, and one of such schools is a school mentioned in sect. 3 of the *Public Schools Act*, 1868, the Commissioners shall not, without the consent of the Special Commissioners for the time being under the *Public Schools Act*, 1868, deal by any scheme with the interest of such last-mentioned school in the endowment, but, with the consent of those Commissioners to the dealing with such interest, may, by a scheme under the principal Act, deal with such interest as well as with all other interests in such endowment."

[This section was repealed by the *Statute Law Revision Act*, 1883 (46 & 47 Vict. c. 39).]

By sect. 17: "The power of making and approving a scheme under the principal Act as amended by this Act shall continue as respects unopposed schemes until the 31st of December, 1874, and as respects schemes against which a petition shall have been presented to the Committee of Council on Education, as in this Act provided, until the 15th of August, 1874, and no longer."

By the *Endowed Schools Act*, 1874 (37 & 38 Vict. c. 87)—

Sect. 1: "On and after the 31st of December, 1874, all powers and duties by the *Endowed Schools Acts* vested

ment which belongs to *Shrewsbury School*: *Attorney-General* v. *Moises* (1).

The jurisdiction of the Court is not taken away by sect. 6 of the Act of 1874.

Cozens-Hardy, Q.C., and *Vaughan Hawkins*, for the Charity Commissioners:—

The Court has no jurisdiction, at any rate without the consent of the Committee of Council on Education; sect. 6 of the *Endowed Schools Act*, 1874. In *Attorney-General* v. *Moises* the governing body of the charity would not give their consent to the appointment of trustees by the commissioners. Of course the provision for the minister of *Bobbington* cannot be diverted by a scheme.

But this is not an "endowment" of *Shrewsbury School*; at any rate, it is not so exclusively. Other schools, which are not "public schools," are included, and the commissioners, at any rate, have exclusive jurisdiction as to that part of the endowment which belongs to the other schools. The proposition that no scheme can be made in the case of a mixed endowment cannot be maintained. Suppose this property had been given wholly to *Shrewsbury School*, and that school had had no other endowment, it would not have been an "endowed school." None of this income goes to the school; it is not in any way controlled by the school, and it is not paid to or spent by any scholar while at the school. It is not an endowment of the school; it is a

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in or imposed on the Endowed Schools Commissioners shall be transferred to and imposed on the Charity Commissioners, and, except as otherwise provided by this Act, shall be exercised and performed by the Charity Commissioners in like manner and form and subject to the same conditions, liabilities, and incidents respectively as such powers and duties have been exercised and performed by the Endowed Schools Commissioners, or as near thereto as circumstances permit."

By sect. 6: "The powers of making schemes under the *Endowed Schools Acts* as amended by this Act shall continue in force for a period of five years from the said 31st of December, 1874; and during the continuance of such powers any Court or Judge shall not, with respect to any endowed school or educational endowment which can be dealt with by a scheme under this Act and the *Endowed Schools Acts*, or any of such Acts, make any scheme or appoint any new trustees without the consent of the Committee of Council on Education."

(1) *Tudor's* Charitable Trusts, 3rd Ed. p. 855.

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benefit given to boys who have been educated at the school upon their going to *Christ Church*. It may be an "educational endowment" within sect. 5 of the Act of 1869, but it is not an "educational endowment" of *Shrewsbury School*.

Sect. 9 of the Act of 1873 is prohibitory, not enabling. It shews that, but for that section, the commissioners could have dealt with the interest of a public school in an endowment in which other schools are jointly interested. That section has been repealed, but it can be referred to for the purpose of argument.

Swinfen Eady, in reply:—

An exhibition comes within the definition of an "educational endowment." These exhibitions are competed for at the school, and are part of the endowment of the school. The exhibitions are school exhibitions, not college exhibitions; it is immaterial where they are tenable. There are not to be two jurisdictions as to different parts of the same endowment; the jurisdiction of the commissioners is excluded *in toto*.

Sect. 9 of the Act of 1873 was an enabling section, but it is repealed.

Sect. 6 of the Act of 1874 ousts the jurisdiction of the Court only as to matters which can be dealt with by a scheme under the *Endowed Schools Acts*.

Ingle Joyce, for the Attorney-General.

1894. July 27. NORTH, J. (after referring to the recitals and the provisions in the scheme of 1861, continued):—

The question is as to the position of *Shrewsbury School*, that being one of the schools with respect to which sect. 8 of the *Endowed Schools Act*, 1869, provided, that nothing in that Act, save as therein expressly provided, should apply to any school mentioned in sect. 3 of the *Public Schools Act*, 1868, or to the endowment thereof, one of which schools was *Shrewsbury*. Now, sect. 4 of the Act of 1869 defines an "endowment," and there can be no doubt that the *Careswell* trust funds form an endowment. Then sect. 5 defines the meaning of the term "educa-

tional endowment." But, for the purpose of considering the position of these schools, it is necessary to look at them separately. I will take one, which is not within the exception which I have read, *Bridgnorth*; what is the position of *Bridgnorth*? I think that if this endowment were wholly for exhibitioners from *Bridgnorth School* it would clearly be within the Act. [His Lordship read sect. 5 of the Act of 1869, and continued:—]

As regards that, it is well to bear in mind the observations of Lord *Hatherley*, L.C., in *In re Meyricke Fund* (1), shewing the universality of that section. He says (2): "The section speaks, in the first place, of the term 'educational endowment' as being applicable to any endowment which has been applied to the education at school of boys and girls, or either of them. Then it goes on to speak of exhibitions tenable at a school, or at an university, or elsewhere. And then it goes on further, and takes the largest view of what an educational endowment may be, by pointing out various purposes which do not seem *primâ facie* to be the immediate purposes of education, but so connected with education as to be within the purport and meaning of the Act. I apprehend that the first intent of the Legislature in framing this Act, which is a highly remedial Act, was that the commissioners should have the largest possible powers; and these general words were used lest anything which might have escaped the attention of the Legislature should afterwards be found unprotected by the supervision and care of the commissioners. Having given these extensive powers, the Legislature proceeded to make certain exceptions, the intention being obviously that everything not immediately in the contemplation of the Legislature should not escape, and that nothing should escape except things to which the attention of the Legislature was expressly directed." That shews the spirit in which this section is to be construed. [His Lordship then read sect. 6, and continued:—]

It was said to be impossible to hold that either *Shrewsbury* or *Bridgnorth* is a school which (supposing this to be the only endowment it has) is "maintained by means of this endowment," inasmuch as the endowment is not for the maintenance of the school

(1) Law Rep. 7 Ch. 500. (2) Law Rep. 7 Ch. 502.

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at all, but is for the maintenance as scholars of persons who have been at the school, but who have left it. I do not think that the meaning of the word "maintained" is so narrow. That, no doubt, is a well-known meaning of the word "maintenance"; but I think it has clearly a larger meaning than that. I think that is shewn by the proviso at the end of sect. 6: "Provided that a school belonging to any person or body corporate shall not by reason only that exhibitions are attached to such school be deemed to be an endowed school." That is, a school which only has exhibitions attached to it is not thereby made an endowed school; but, if it is an endowed school on other grounds, then I take it that the exhibitions, as well as anything else, are part of the "educational endowment" of the school. There would be no reason for this proviso unless the prior words would, but for the proviso, have made the school an "endowed school." Then, again, it must be noticed that the phrase used is "exhibition attached to such school," and I think it is clear that there it refers to exhibitions attached to a school, as in the present case, for the maintenance of scholars at an university or elsewhere than at the school, and it shews, I think, that an "exhibition attached to a school" in that sense is clearly within the word "maintained" used in the earlier part of sect. 6, from which the proviso is an exception.

I think, therefore, that the exhibitions in question, if attached to *Bridgnorth School* alone, though they would not alone make it an "endowed school," yet, having regard to its position as being otherwise an "endowed school," would be part of its "educational endowment," and would be applied for the maintenance of the school, or, in other words, the school would be maintained in part by them. This is not at all an unreasonable meaning to give to the words, because you may well say that a school is maintained, not merely by the funds which pay the masters and maintain the boys, but by any larger application of a fund which has the effect of increasing the attractions of the school and benefiting it in that way. If, therefore, we had to deal with *Bridgnorth School* alone, I think that the Charity Commissioners alone would clearly have jurisdiction over this fund. But we are not dealing with *Bridgnorth* alone; we have

to deal with *Shrewsbury* also. Supposing that *Shrewsbury* were the only school to which these exhibitions were attached, I think it is unnecessary for me to decide what the position of matters would be. It may be assumed for the present purpose that, if *Shrewsbury* alone had the benefit of this endowment, it would not be within the jurisdiction of the commissioners. But I have to deal with a case in which an educational endowment is applicable for the benefit of *Shrewsbury*, which is a "public school," and also of five other schools which, in my opinion, are clearly "endowed schools," and not "public schools."

The question is, What jurisdiction the commissioners have in such a case?

In my opinion the commissioners have jurisdiction to deal with such a case, and I think that is shewn by sect. 24 of the Act of 1869. I think that section shews that the power of the commissioners is not confined to that part of the fund which is an "educational endowment" alone; for, if so, I do not understand how the provisions of this section could work. No doubt the words used in sect. 5 rather favour that view, for the language there used is "'educational endowment' means an endowment, or any part of an endowment, which, or the income whereof, has been made applicable or is applied for the purposes of education," &c. The words are "endowment or any part of an endowment which," not "endowment which, or any part of which, has been made applicable," and to that extent they are rather in favour of the opposite view. But looking at sect. 24, I think it is clear that the commissioners have jurisdiction over the other non-educational part of the endowment, subject to the limitation and control of that section. I do not see the object of saying in sub-sect. 1 that "the part of the endowment which is applicable to such other charitable uses shall not be diverted by the scheme from such uses," if, but for this section, the commissioners would have had no control over it, if their power had been limited to that part of the fund which belonged to an "endowed school" proper within the meaning of the Act. [His Lordship read sub-sect. 3, and continued:—]

That leads me to consider the other alternative. Supposing that the proportion applicable to other charitable uses does not

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exceed one-half of the whole endowment, then this provision would not apply, whereas if the jurisdiction of the commissioners had been, in the first instance, confined to the part of the endowment which was an "educational endowment" alone, this section would not have been required. Therefore, looking at this section, I think that the jurisdiction of the commissioners is not limited to that part of the exhibitions in question which are available for the five schools which are not "public schools," excluding *Shrewsbury*, which is a "public school."

I think this is made still clearer by sect. 9 of the *Endowed Schools Act*, 1873. At the time when that section was passed the Public Schools Commissioners, under the Act of 1868, were in existence. It is said, on the one side, that that is an enabling section, and on the other side that it is a disabling section. The meaning, I think, is this: It says that, where two or more schools are jointly interested in an educational endowment, one of them being a public school and the others not, the power of the commissioners to deal with the interest of the public school in the endowment shall be limited to a case in which the consent of the Public School Commissioners to their so dealing is obtained. The power can be exercised with the consent of the Public School Commissioners, but not without it. I think the fair construction of that section is, that it has the effect of preventing something from being done which could have been done before. It is disabling beyond all question; it says that something is not to be done, except under special circumstances, and then it goes on to point out under what special circumstances the thing may be done. To my mind, it throws great light upon the construction of sect. 24, which, independently of sect. 9, I think had not the meaning which it is sought to give to it, but sect. 9 strongly confirms my conclusion. Sect. 9 has, no doubt, been repealed by the *Statute Law Revision Act*, 1883, but that was simply for this reason, that the Public Schools Commissioners had ceased to exist, and if it had been left standing it would have been an absolute veto on dealing with such funds as I am referring to, because the commissioners could not deal with them without the consent of the Public Schools Commissioners, and they could not deal with them with their consent, because there is no longer

such a body in existence. The effect of continuing the operation of sect. 9 would be to prevent the fund from being dealt with at all, and its repeal under the circumstances indicates, to my mind, that, now that it is out of the way, the commissioners have jurisdiction to deal with the whole of such a joint fund. Then, if that is so, sect. 6 of the Act of 1874 seems to me to apply; and, the consent of the Committee of Council on Education not having been obtained, the Court is forbidden from making any scheme.

Then *Attorney-General* v. *Moises* (1) was referred to as leading to a contrary conclusion. Sir *G. Jessel*, M.R., pointed out that in that case more than half the fund was not applied to educational purposes, and that, consequently, sub-sect. 3 of sect. 24 of the Act of 1869 applied, and he said: "It is plain, therefore, that if there were no other Act the corporation, through its head, refusing to assent, the commissioners could not, by any scheme whatever, appoint new trustees, who would have the management of the charity estates, or alter the mode of dealing with them." It is only fair to say that when the Master of the Rolls dwells upon the fact that the existence of the non-educational part of the fund was more than a moiety, I think his view would have been different if that part had been less than a moiety, the section contemplating the alternative state of things. Then a little farther on, speaking of sect. 6 of the Act of 1874, the Master of the Rolls says: "'Educational endowment,' in this section, clearly means what I will call a pure educational endowment. Now, I am not going to interfere with respect to the endowment of the school or the educational endowment. I am not going to appoint new trustees of them. If I appoint new trustees at all it is only of the old charity estates. The educational endowment consists merely of certain sums out of the charity estates and the school house. There is no other educational endowment. It appears to me, therefore, that that section does not apply to the case of a mixed endowment, where by reason of the dissent of the governing body the Charity Commissioners cannot make a scheme affecting the property. Consequently, in my opinion,

(1) *Tudor's* Charitable Trusts, 3rd Ed. pp. 855, 858.

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the jurisdiction remains." That paragraph of the judgment has been much relied on, but it must be read with the preceding paragraph, which shews to what extent he considered the jurisdiction existed. It did not enable the Court to interfere in any way with the educational endowment, but to do something wholly outside of it.

In my opinion, therefore, in the present case, under sect. 6 of the Act of 1874, the endowment being one which can be dealt with by a scheme under the *Endowed Schools Acts*, the Court is precluded from exercising jurisdiction.

Solicitors: *H. Andrews; Clabon; Solicitor to the Treasury.*

W. L. C.

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[1894 M. 2113.]

Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 7, 14—*Company Limited by Guarantee—Shares.*

The articles of a company limited by guarantee not having a capital divided into shares may provide for the division of the interests of the members in the undertaking of the company into transmissible shares.

THE *General Mineral Patents Syndicate, Limited*, was registered on the 23rd of February, 1894, as a company limited by guarantee, and not having a capital divided into shares. By clause 4 of its memorandum of association, every member of the company undertook to contribute to the assets of the company in the event of the same being wound up, such amount as might be required not exceeding £1 sterling. The memorandum was accompanied by articles, of which article 1 was as follows:—

"For the purpose of registration the number of members of the company is declared to be twenty; but the directors may register an increase in the number of members whenever they think fit."

At general meetings of the company held on the 13th of June and on the 11th of July, 1894, respectively, a special resolution was passed adopting new articles of association.

Articles 2 to 7 of the new regulations were as follows:—

2. "The regulations contained in Table A in the first schedule to the *Companies Act*, 1862, shall not apply to the company."

3. "For the purpose of registration the number of members of the company was and is declared to be twenty; but the directors may register an increase in the number of members whenever they think fit."

4. "In order to determine the proportions in which the members for the time being of the company are interested in the company, the undertaking of the company shall be deemed to be divided into a specified number of shares or interests, and the members shall be deemed to be interested in the company in proportion to the number of such shares or interests for the time being registered in their respective names as hereinafter provided, and until otherwise determined by special resolution the undertaking of the company shall be deemed to be divided into 1400 shares or interests numbered 1 to 1400 inclusive."

5. "The members of the company at the time when these regulations come into operation shall be deemed to be entitled to the said 1400 shares or interests in equal proportions."

6. "The number of shares or interests into which the company is to be deemed to be divided may, at any time, by special resolution, be increased to such extent as may seem expedient, and any additional shares or interests resulting from such increase may be appropriated and dealt with in such manner as the directors think expedient. Any preferential qualified or special rights, privileges, or conditions may be attached to any such additional shares or interests. The additional shares shall be numbered 1401 onwards."

7. "Persons may become members of the company by original subscription or by admission, or transfer, or by succession. The subscribers to the company's memorandum of association are members by original subscription. Any person who hereafter desires to become a member by admission or to increase his holding in the company must apply in writing to the company for admission to membership or for an increased holding, and must state in such application the number of shares or interests or additional shares or interests in respect of which he desires to

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become a member, and if there are any unappropriated shares or interests it shall be for the directors to accept or reject such application, and in the former case to determine the number of shares or interests in respect of which such applicant shall be admitted to membership or permitted to increase his holding, and the applicant shall become a member interested or additionally interested in accordance with such determination."

Articles 10 to 15 provided for the following matters: the forfeiture of "shares or interests" in case of non-payment of "any call, instalment, or other moneys" due from a member; the issue of certificates in respect of the "shares or interests"; a lien on members' "shares or interests"; the transfer and registration of transfers of "shares or interests"; the annual closing of the transfer books and register, and the recognition of the personal representatives of deceased members as the only persons entitled to the "shares or interests" of a deceased member.

The Plaintiff as member of the Defendant company claimed a declaration that clauses 4 to 7 inclusive of the new regulations were *ultrà vires* and illegal, and an injunction to restrain the company from acting on those articles.

The action was brought on on motion for injunction treated as the trial.

Everitt, Q.C., and *Macnaghten*, for the motion:—

The effect of what the Defendant company is attempting to do would be to create a share capital to which the members were under no liability to contribute. The *Companies Act*, 1862, provides for the incorporation of limited companies, limited by shares or limited by guarantee. The latter kind of companies may or may not have a capital divided into shares (*Companies Act* 1862, ss. 6, 8, 9, 14, 24, 25). Their power of altering the articles of association under sect. 50 is confined to alterations within the scope of the original constitution. They have no power to convert a company without a capital divided into shares into a company with a capital divided into shares. Sects. 90 and 104, and sect. 25 of the Act of 1867, are inconsistent with there being a share capital and no liability to contribute to it.

Swinfen Eady, Q.C., and *A. J. Chitty*, for the Defendant company:—

There is nothing inconsistent with the provisions of the *Companies Act* in there being a company without a share capital in which the shareholders have another interest capable of being divided among the members in specific shares.

The *Companies Act*, 1862, ss. 22, 180, contemplates such an interest, and such an interest has been recognised by decision: *Ooregum Gold Mining Company of India* v. *Roper* (1); *Winstone's Case* (2).

For this purpose there is no distinction between a trading and another company.

The Defendant company, under the new regulations, has no more a capital divided into shares than it had under the original regulations.

Everitt, in reply.

NORTH, J.:—

This motion is made upon the belief that the company has done something which it has not done. I do not see that it has either done anything which according to the Act it should not have done, or abstained from doing anything which according to the Act it should have done. The case seems to me to be in a nutshell. The 8th section of the *Companies Act*, 1862, provides: "Where a company is formed on the principle of having the liability of its members limited to the amount unpaid on their shares, hereinafter referred to as a company limited by shares, the memorandum of association shall contain the following things: (1.) The name of the proposed company, with the addition of the word 'Limited' as the last word in such name: (2.) The part of the *United Kingdom*, whether *England*, *Scotland*, or *Ireland*, in which the registered office of the company is proposed to be situate: (3.) The objects for which the proposed company is to be established: (4.) A declaration that the liability of the members is limited: (5.) The amount of capital with which the company proposes to be

(1) [1892] A. C. 125, 146. (2) 12 Ch. D. 239.

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registered divided into shares of a certain fixed amount: subject to the following regulations:—(1.) That no subscriber shall take less than one share: (2.) That each subscriber of the memorandum of association shall write opposite to his name the number of shares he takes." Then there is another form of company contemplated by the *Companies Act*, 1862—a company limited by guarantee as it is called—and sect. 9 provides: "Where a company is formed on the principle of having the liability of its members limited to such amount as the members respectively undertake to contribute to the assets of the company in the event of the same being wound up, hereinafter referred to as a company limited by guarantee, the memorandum of association shall contain the following things (that is to say): (1.) The name of the proposed company, with the addition of the word 'Limited' as the last word in such name: (2.) The part of the *United Kingdom*, whether *England*, *Scotland*, or *Ireland*, in which the registered office of the company is proposed to be situate: (3.) The objects for which the proposed company is to be established: (4.) A declaration that each member undertakes to contribute to the assets of the company, in the event of the same being wound up, during the time that he is a member, or within one year afterwards, for payment of the debts and liabilities of the company contracted before the time at which he ceases to be a member, and of the costs, charges, and expenses of winding up the company, and for the adjustment of the rights of the contributories amongst themselves, such amount as may be required, not exceeding a specified amount." Therefore there are two modes provided in which a company may be formed.

Then I do not think I need refer to any other section until we come to the 14th, which says: "The memorandum of association may, in the case of a company limited by shares"—that is, formed under sect. 8; "and shall, in the case of a company limited by guarantee"—that is sect. 9; "or unlimited, be accompanied, when registered, by articles of association, signed by the subscribers to the memorandum of association and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient." Then, having said that of the memorandum, it proceeds thus as to the articles: "The

articles shall be expressed in separate paragraphs, numbered arithmetically: they may adopt all or any of the provisions contained in the Table marked (A) in the First Schedule hereto: they shall, in the case of a company, whether limited by guarantee or unlimited, that has a capital divided into shares, state the amount of capital with which the company proposes to be registered; and in the case of a company, whether limited by guarantee or unlimited, that has not a capital divided into shares, state the number of members with which the company proposes to be registered, for the purpose of enabling the Registrar to determine the fees payable on registration: In a company limited by guarantee or unlimited, and having a capital divided into shares, each subscriber shall take one share at the least, and shall write opposite to his name in the memorandum of association the number of shares he takes." There the phrase is used several times, "having a capital divided into shares," and the argument addressed to me has been in reality that that is the same thing as a capital limited by shares, because such a company either has its capital divided into shares, or, if it has not, it ought to have; and the whole contention before me is that this company, which clearly was in the first instance formed as a company limited by guarantee, and was not, and was never intended to be, anything but that—not having a capital divided into shares—had, by operation of the rules that it had framed, attempted to become a company which ought to have a fixed capital and ought to have that fixed capital divided into a certain number of shares. I do not think that is the basis upon which the company has gone at all. I do not think they either mean to have a fixed capital, or to divide that fixed capital into any number of shares. They are attempting to do a thing, for some reason, which I do not thoroughly understand, and which I very much doubt whether they can successfully accomplish; they desire in some way, keeping themselves as a company limited by guarantee without a share capital, to express fractionally the interests in the company of the several members. What good it will do them I do not quite know; but that is a totally different thing from fixing the capital, which is neither fixed nor proposed to be fixed; and, in my opinion, you cannot

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have a company with a capital divided into shares within the meaning of the phrase used in the Act of Parliament when you do not have a capital at all—when the company is not under the obligation of having a capital at all—but where it is formed on the basis of limitation by guarantee, and not having a stated capital divided into shares. A good many of the sections which were referred to no doubt are somewhat difficult to construe, if the phrases "limited by shares" and "having capital divided into shares" mean the same thing; but, in my opinion, they do not. The Plaintiff has mistaken the position of the company, and I must dismiss the action.

Solicitor for Plaintiff: *S. Jacomb Hood.*
Solicitors for Defendants: *Stretton, Hilliard, Dale, & Newman.*

D. P.

NORTH, J. 1894 *July* 28.

Ex parte VICAR OF ST. BOTOLPH, ALDGATE.

Public Undertaking—Sale by Limited Owner—Application of Purchase-money—Repairs.

Funds representing the purchase-money of part of a churchyard taken for street improvements applied in the purchase, alteration, and repair of a house for a vicarage.

IN the year 1890, under the *Metropolitan Street Improvement Act* (57 Geo. 3, c. xxix.) and a faculty obtained for the purpose, certain portions of the churchyard of *St. Botolph, Aldgate*, were purchased and thrown into streets. The purchase-money, £3500, was paid into Court in pursuance of sect. 84 of the Act. So long as interments were made in the parish churchyard the burial fees were received by the vicar. The churchyard was closed as a place of burial in 1854. By an order of Court, dated the 10th of February, 1861, the income of the purchase was ordered to be paid to the vicar of the parish for the time being.

It was desired to purchase a house and by alterations and repairs put it in a condition suitable for occupation as a vicarage. Two provisional agreements had been entered into for the purchase of the freehold subject to a lease for £1500, and of the

leasehold interest for £10 and an obligation to pay £70 rent. An estimate had been made that an expenditure of between £1200 and £1500 would be necessary for alterations and repairs to place the house in a state suitable for occupation as a vicarage. The repairs and alterations could not be completed till the expiration of the current half-year.

This was a petition by the vicar to obtain the sanction of the Court to the provisional agreements and the application of a sufficient part of the sum in Court in paying the purchase-money, including rent, rates, and taxes, in paying for alterations and repairs an amount not exceeding £1500, and in making up the income of the vicar from the fund in Court for the current half-year to £48 1*s.* 8*d.*—the half-yearly amount he had been receiving under the order of February, 1861.

Atlay, for the Petitioner:—

The vicar was the only person interested in any profits derived out of the churchyard; the Court, therefore, on a former occasion ordered the income of the funds representing the purchase-money to be paid to him; the capital, being capital belonging to the living, may be properly invested in the purchase of a house for a vicarage. In *In re Nether Stowey Vicarage* (1) the Court refused to allow repairs to be paid for out of capital. But in this case the proposed expenditure for repairs and alterations is really part of the price of a proposed purchase.

J. Henderson, for the Commissioners of Sewers.

NORTH, J.:—

I think the expenditure may be allowed. The provisional agreements are for the purpose of acquiring a suitable house for a vicarage for the parish. There is a house desirable in other respects, but not suitable by reason of its being out of repair and requiring some alterations. If the vendor were to make the alterations and do the repairs, there can be no doubt the purchase might be made at a price increased by the expense of the repairs and alterations. I think what is proposed amounts to the same

(1) Law Rep. 17 Eq. 156.

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thing as purchasing a suitable house, and the Court has jurisdiction to allow the proposed expenditure. It may be noticed that in *In re Nether Stowey Vicarage* (1) the application was for the repayment of money already spent.

The payment of the expenses of repairs and improvements will be made on the certificate of the architect.

Solicitors for the vicar: *Lee, Bolton, & Lee.*
Solicitor for the Commissioners: *E. A. Baylis.*

D. P.

NORTH, J. 1894 *May* 23, 24; *Aug.* 1.

In re WILSONS & STEVENS' CONTRACT.

[1894 S. 272.]

Vendor and Purchaser—Wilful Default—Vendor and Purchaser Act, 1874 (37 & 38 *Vict. c.* 78), *s.* 9—*Compensation.*

Delay in completing a sale occasioned by the vendors having omitted to take steps to procure certain admissions to copyholds, *held* to arise from the wilful default of the vendors.

Damages to the purchaser by reason of such delay, *held*, not recoverable as compensation under the *Vendor and Purchaser Act.*

THIS was a summons taken out under the *Vendor and Purchaser Act* by the purchaser in relation to a contract for sale of land at *Hendon* made on the 3rd of July, 1893.

The sale was made under printed conditions prepared for an auction held on the 14th of the previous month. The conditions of sale provided for payment of the balance of the purchase-money and completion of the purchase on the 29th of September, 1893, and if from any cause whatever other than wilful default on the part of the vendors the purchase should not be completed on that day, the purchaser should pay interest from that day till the payment of the purchase-money at the rate of 5 per cent. per annum.

The vendors were mortgagees of *William Rayner* selling under their statutory power of sale. The summons was taken out by Mrs. *Stevens*, the purchaser. The title was accepted, and on

(1) Law Rep. 17 Eq. 156.

the 15th of September a draft conveyance was sent on behalf of the purchaser to the vendors' solicitors. A part of the property was copyhold.

The abstract of title disclosed that in June, 1886, the property sold was conveyed and covenanted to be surrendered to the vendors by way of mortgage, and in July, 1886, the mortgagor made the usual conditional surrender of the copyholds in favour of the vendors as mortgagees; that in May, 1889, the vendors, in exercise of their power of sale, conveyed the property to a purchaser by a deed of conveyance, which recited that the vendors had not been admitted to the copyholds, and therefore did not pass the legal interest therein, but only the vendors' equitable interest, and that on the following day the purchaser mortgaged the property to the vendors to secure payment of the purchase-money, and, although he had not been admitted, covenanted in the mortgage deed to execute the usual conditional surrender to the vendors. It was in exercise of the powers of sale under the last-mentioned deed that the vendors had contracted to sell the property.

The vendors took no steps to put themselves in a position to convey the copyholds till the 10th of October, on which day application was made to the lord of the manor to admit the vendors. Negotiations took place between the vendors and the steward of the manor as to the necessary admittance and the remission of fees, and the vesting of the legal interest in the copyholds in the vendors: the negotiations resulted in the steward's withdrawing certain of his requirements, and the vendors being admitted on the 14th of December to the copyholds. The conveyance was completed on the 17th of January, 1894.

The questions raised by the summons were:—

(1.) Whether the purchaser was bound to pay any and what interest on the purchase-money under the conditions of sale.

(2.) Whether she was entitled to compensation for loss sustained by reason of the delay in completion.

The purchase-money had been placed on deposit at a bank. The vendors had received the bank interest, and the purchaser submitted to pay interest from the time when the vendors were in a position to complete down to the time of actual conveyance.

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She claimed to be entitled to compensation for loss occasioned by delay in completing repairs, for loss of an opportunity of getting rid of her present house, and for loss of an opportunity of letting a part of the property purchased.

Martelli, for the purchaser:—

The delay was caused by the vendors not having put themselves in a position to convey the legal estate and complete at the time fixed. The purchaser is, therefore, not bound to pay interest until the vendors were in a position to call upon her to accept the conveyance: *In re Young and Harston's Contract* (1); *In re Hetling and Merton's Contract* (2); *In re Mayor of London and Tubbs' Contract* (3). The purchaser is entitled to compensation for the loss she has sustained by reason of her not having been able to deal with the property purchased: *Royal Bristol Permanent Building Society* v. *Bomash* (4).

Daniel Jones, for the vendors:—

The delay that was caused in completion was not caused by wilful default on the part of the vendors. No requisition was made to them during the investigation of the title. As to getting in the complete legal interest in the copyhold, they applied within a reasonable time to the lord to get the admission of their mortgagor. At the most, they are liable in respect of the time between the 29th of September and the 20th of October, for the delay after that time was owing to events over which they had no control: *In re Young and Harston's Contract*; *In re Hetling and Merton's Contract*; *Fry* on Specific Performance (5); *In re Mayor of London and Tubbs' Contract*; *Clarke* v. *Ramuz* (6).

The purchaser is seeking for damages, and not compensation for loss in respect of the delay. There is no jurisdiction to give damages on a summons under the *Vendor and Purchaser Act*, 1874: *In re Hargreaves and Thompson's Contract* (7).

(1) 31 Ch. D. 168.
(2) [1893] 3 Ch. 269.
(3) [1894] 2 Ch. 524.
(4) 35 Ch. D. 390.
(5) 3rd Ed. p. 627.
(6) [1891] 2 Q. B. 456.
(7) 32 Ch. D. 454.

Martelli, in reply:—

The difficulty which caused the delay arose on a matter of conveyance, and not on a question of title; it was not the subject of requisition.

1894. Aug. 1. NORTH, J. (after stating the facts, continued):—

The purchase was actually completed on the 17th of January, 1894; and all questions have been settled between the parties except those mentioned in the summons, the first being whether the purchaser is bound to pay interest at 5 per cent. on the purchase-money according to the conditions from the 29th of September down to the middle of December, it not being disputed that such interest is payable from that date; and the second question being whether the purchaser is not entitled to some compensation by reason of the great delay that has occurred in completion, possession having been refused to her in the meantime.

The purchaser can only escape the payment of interest if the delay in completion was occasioned by wilful default on the part of the vendors; and it clearly has not been caused by any default of the purchaser. The title was accepted on her behalf long before the 29th of September, and she was anxious to complete on that day; and her purchase-money was ready, and, completion not having then taken place, was actually deposited at a bank. The vendors, on the other hand, were not then able to complete; they had to give a legal conveyance of the copyhold as well as the freehold, and were not then in a position to do so; and in fact it was not until the 10th of October that, by a letter of that date, they first approached the lord of the manor on the subject, although that letter shews that they had been in communication with him as to this property so far back as the previous May. It was suggested that no requisition had been made on this subject; but the point seems to me one of conveyance rather than of title, and it is not disputed that the vendors were bound to procure the legal estate to be vested in the purchaser by a surrender from them. It was suggested that they were justified in postponing all steps for that purpose until they knew whether the purchaser would complete, or whether

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the sale would go off; but this seems to me an idle excuse. There was no reason for doubting that the sale would go through. Moreover, as the vendors were desirous of realizing their mortgage, their admittance was essential, as they would have sold to some one else even if this sale had gone off; but from May until October they allow the matter to sleep, having in the meantime fixed to complete the purchase on the 29th of September and having bound the purchaser to pay high interest from that date, although not in default in any way.

Was this wilful default on the part of the vendors? In my opinion it was. I have carefully considered the judgments in *In re Young and Harston's Contract* (1); *In re Hetling and Merton's Contract* (2), and the more recent case of *In re Mayor of London and Tubbs' Contract* (3), and, following the example there set, I do not attempt to define precisely what is and what is not wilful default in the abstract; but I find the following observations of Lord Justice *Lindley* in *In re Hetling and Merton's Contract* (4) very much in point. He says: "Whatever may be the popular meaning of wilful default, whatever the expression may mean in dealing with other matters, it is now settled that moral delinquency, intentional delay, wilful obstruction on the part of a vendor, may all be absent, and yet there may be wilful default on his part disentitling him to interest under a contract such as that before us. If a vendor knows the material facts—knows that there are difficulties which it is his duty to overcome—knows that he may not be able to overcome them by the time fixed for completion, and he fails to overcome them by that time, although no fresh unforeseen occurrence prevents him from doing so, the delay caused by such failure on his part is attributable to his wilful default in the sense in which that expression is used in contracts of this description; and his right to interest during such delay is excluded."

In the present case the vendors knew the material facts—that the purchaser was entitled to have the legal estate in the copyholds transferred to her, that this could only be accomplished by the vendors being themselves admitted by the day fixed for com-

(1) 31 Ch. D. 168.
(2) [1893] 3 Ch. 269.
(3) [1894] 2 Ch. 524.
(4) [1893] 3 Ch. 281.

pletion, and that this was a matter which must take some time; but the vendors (not from forgetfulness, for that is not suggested, but) deliberately abstained from taking any steps to qualify themselves to transfer this legal estate until nearly a fortnight after the time fixed for completion, and then spontaneously took a step which they might have taken, and ought to have taken, many weeks before, the neglect of which did not arise from any unforeseen occurrence, and for which no reasonable excuse is given; and I hold that such conduct on their part was most unreasonable and improper, and is attributable to their wilful default in the sense in which that phrase is used in such contracts as the present, and that it relieves the purchaser from the condition to pay interest from the 29th of September.

Then for what period is the purchaser relieved from interest? It is said that, in any case, interest should run from the 10th of October, but I see no sense in this; the vendors could not then complete, nor could they have done so before the 14th of December; and I think that the purchaser was entitled to at least three days' notice of completion when it has been delayed by the vendors' default for nearly three months, and therefore I fix the 17th of December as the date from which the interest under the conditions should run. The delay between the 10th of October and the 14th of December is said to have been caused by default of the lord of the manor, and not of the vendors; but I do not think that this is so: some lapse of time was necessary, as the advisers of the lord could not be expected to put everything else aside and take up this matter at once; some was caused by an unsuccessful attempt on the part of the vendors to get the lord's fines reduced, and some delay arose from an attempt to cut down the fees of the steward, who assented to an abatement of twenty-five per cent. But I cannot fix any time between those two dates at which I can say that the vendors ceased to be in default arising from their own spontaneous omission to get their title to surrender complete by the 29th of September, or say that the purchaser ought to begin to pay interest before the 17th of December. It is not disputed that from that time she is bound to do so, and she has in fact done it. There might be a serious question to whom the interest

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on the deposit belonged during the time the vendors persisted in resisting the purchaser's proposal as to completion and refused to let her repair the property; but as the purchaser has from the first offered to pay the bank interest to the vendors, and has actually paid it over, I will not go behind that arrangement. What the purchaser, therefore, has to pay is the difference between the interest paid by the bank from the 17th of December to the 17th of January, and the interest at 5 per cent. on the balance of the purchase-money between the same dates.

The purchaser also claims compensation for the delay in completion; and she was no doubt put to considerable inconvenience and loss thereby owing to the unreasonable conduct of the vendors. But what is sought to be recovered under this head is not compensation properly so called, and is not sought to be deducted from the purchase-money, which has been paid in full; it is really unliquidated damages arising out of non-delivery of possession according to the conditions, and is made up of claims for damages for three months' delay in completing repairs necessary before going into occupation; for the loss of an opportunity of getting rid of the purchaser's former residence on advantageous terms; and for the loss of an opportunity for advantageously letting part of the property purchased. Even assuming (a very strong assumption as to parts of the claim) that the purchaser could have recovered such damages in an action for damages, I am of opinion that she cannot do so on a summons under the *Vendor and Purchaser Act.* In *In re Hargreaves and Thompson's Contract* (1), when a purchase went off for want of title, the Court did give the purchaser interest on the deposit and costs of investigating the title, which certainly do savour of damages; but some difficulty was felt even in going to that extent; and it was pointed out that there is not jurisdiction under the Act to give such damages as I am asked for here.

Lord Justice *Cotton*, after referring to the sections of the Act, said (2): "Although no doubt interest cannot be given on the deposit except by way of damages, and the cost of investigating the title would not be given to the purchaser if he brought an action except by way of damages, yet they are damages which,

(1) 32 Ch. D. 454. (2) 32 Ch. D. 457.

without any special case being made, would be awarded, and properly awarded, either by a Judge or by a jury in a case where the vendor could not make a good title to that which he had purported to sell. And, in my opinion, this Act of Parliament authorizes us not only to make an order for a return of the deposit, but to give in addition that which without any special circumstances and under ordinary circumstances would be the consequence if an action had been brought to recover damages. In doing so we are not treating it as an action for damages, because, in my opinion, we could not go into any special case which the purchaser might make to get extraordinary damages or special damages, but can only give damages which naturally flow as the right of the purchaser from the order that we have made declaring that the vendors have not made a good title." Lord Justice *Lindley* says (1): "I quite agree that you cannot under this section dispose of what would be the subject of an action for damages of an extraordinary kind; such for example as the demand made in *Bain* v. *Fothergill* (2), by the purchaser to obtain from the vendor extraordinary damages contrary to the general rule. But all such damages as interest and expenses of investigating the title, which, although they are called damages are matters rather for computation and taxation than for an inquiry, the Court has authority to order to be paid. I am therefore of opinion that Vice-Chancellor *Hall's* doubt was unfounded, and I quite agree in the order which Lord Justice *Cotton* has pronounced." And Lord Justice *Lopes* gave judgment to a similar effect. This is a direct authority in favour of the view that such damages as are here claimed cannot be recovered by a summons under the *Vendor and Purchaser Act.* The vendor relied upon the decision of Mr. Justice *Kekewich* in *Royal Bristol Permanent Building Society* v. *Bomash* (3) as a decision to the contrary; but it is not so. Assuming that there was no difference between the two cases in other respects, that case was totally different from this in the very point I am now considering; for the damages were recovered by the purchaser in a cross-action for specific performance with compensation brought by

(1) 32 Ch. D. 459. (2) Law Rep. 6 Ex. 59; 7 H. L. 158.
(3) 35 Ch. D. 390.

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the purchaser by counter-claim, and were not recovered on a summons under the *Vendor and Purchaser Act.*

The order will, therefore, be that the Applicant is liable to pay such interest as I have mentioned, and no more; and I dismiss the summons so far as it seeks compensation, but without prejudice to any action for damages for delay in completion which the purchaser may be advised to bring.

It is not a case for giving costs to either party.

Solicitors for vendors: *Nicol, Son & Jones.*

Solicitors for purchaser: *Warburton & De Paula.*

D. P.

NORTH, J. 1894 *Aug.* 3.

SINCLAIR *v.* JAMES.

[1894 S. 2900.]

Practice — Partition Action — Parties — Mortgage — Dismissal as against Mortgagees.

An action for partition was brought by the owner of the equity of redemption of an undivided share of land subject to mortgages affecting the whole, the Plaintiff's mortgagee and the overriding mortgagees being made parties. The action was dismissed against the several mortgagees as shewing no reasonable cause of action against them.

THIS was an action for the partition or sale of the real estate devised by the will of *William Standish Carr Standish*, who died in 1878. The testator's real estate consisted of estates in *Lancashire*, subject to a mortgage to the *Law Life Assurance Society*, Defendants to the action, and estates in *Durham*, subject to a mortgage now vested in *Richard Hermon*, *A. Staveley Hill*, and *John James*, Defendants to the action, hereafter called "*Hermon's* trustees."

The testator devised his real estate to his three sisters, *Susan A. G. Paulet* (now dead), *Margaret L. M. Lucy*, a Defendant, and *Emma T. H. Carr Sinclair* (now dead). The Plaintiff was entitled under the will of his mother, Mrs. *Sinclair*, to her one-third of the estate, subject to the two overriding mortgages, and charged as to his undivided share by his marriage settlement with an

annuity and a mortgage made by himself to *Thomas Brewis*, a Defendant to the action.

Mrs. *Paulet's* one-third undivided share was mortgaged by her to Colonel *Charles Paulet*, and devised to Colonel *Paulet* and *Clarence G. Sinclair*, a Defendant, in trust for sale.

Mrs. *Lucy's* one-third was conveyed in settlement to Colonel *Paulet* and *John James*, Mrs. *Lucy* and her husband, also a Defendant, being the first tenants for life.

The action was brought on on two motions, one on the part of the Defendants, *Hermon's* trustees, and *Thomas Brewis*, the other on the part of the *Law Life Assurance Society*, to dismiss the action on the ground that the statement of claim did not disclose any reasonable cause of action against them.

Everitt, Q.C., and *S. Dickinson*, for *Hermon's* trustees and *Brewis*.

S. Hall, Q.C., and *Methold*, for the *Law Life Assurance Society*:—

The Plaintiff has no right to bring a partition action against his own mortgagee against the will of the mortgagee, for the effect of a partition decree or sale would be to alter the nature of the property subject to the mortgage: *Gibbs* v. *Haydon* (1).

The only right the parties interested in an equity of redemption have against the mortgagees is to redeem; therefore, the overriding mortgagees cannot be made parties against their will to an action merely claiming partition or sale: *Swan* v. *Swan* (2).

Swinfen Eady, Q.C., and *Willis Bund*, for the Plaintiff:—

The paramount mortgagees have no interest in the partition of the equity of redemption: *Waite* v. *Bingley* (3); and are not necessary parties to a partition action between the owners of undivided shares in the equity of redemption; but they are not prejudiced by being made parties, and are not improper parties.

A partition action could not be worked out without the persons interested in the whole of each share. Therefore, the Plaintiff was bound to make his own mortgagee a party: *In re Hardiman* (4).

(1) 30 W. R. 726.
(2) 8 Price, 518.
(3) 21 Ch. D. 674.
(4) 16 Ch. D. 360.

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We ask to be allowed to amend the pleadings by adding a claim to redeem his mortgagee.

Arnold Herbert, for other parties to the action.

NORTH, J. (after stating the facts, continued) :—

First, to take the case of the overriding mortgagees, I cannot see any reason why they should be parties to the action, and no partition of the interests of persons entitled to the equity of redemption can affect them. A partition of the equity of redemption cannot diminish or affect their rights. That point is covered by the authority cited: *Swan* v. *Swan* (1). The Court will in making the decree direct inquiries as to the parties interested, and, among others, an inquiry as to what mortgages affect the whole property, and in a proper case order a sale with the concurrence of such of the mortgagees as will concur. That is no reason for making them parties; if they were made parties and willing to be parties, and bound by the decree, I cannot say they would be improper parties; but, being brought here against their will, I think they are entitled to say that against them no decree can be made. The only case that would justify bringing them here against their will would be a claim for redemption, which would operate as a foreclosure in case the money found due to them was not paid at the date fixed. In my opinion the statement of claim discloses no reasonable ground of action against the overriding mortgagees, and the action must be dismissed against them.

The matter stands on a different footing as far as regards the mortgagee of the Plaintiff's particular share. It cannot be said that he has no interest in a partition of the property. His mortgage is the mortgage of an undivided third of an equity of redemption. If a partition were made he would be the mortgagee of a divided share, and the nature of his security would be altered. But no action can be brought against him except an action to redeem. I think the case of *Gibbs* v. *Haydon* (2), before Mr. Justice *Fry*, is clearly in point—a case in which the decision was justified by the cases referred to in it, and which has been

(1) 8 Price, 518. (2) 30 W. R. 726.

taken as settled law ever since. Then it is said there was a mistake in the pleadings, and I am asked to allow an amendment by the addition of a claim for redemption. If there were merely a slip, and the action would be right when amended, I should allow an amendment. But this is not so: for I do not think that a plaintiff mortgagor can combine in the same action a claim against his own mortgagee to redeem him with a claim for partition against another defendant. Though at the present time the rules as to pleading do allow claims to be combined in the same action to a greater extent than formerly, I do not see how this can be done in a case where a judgment for redemption and payment would have to be finally worked out against one defendant before any judgment for partition could be pronounced against the other. On the grounds I have stated I am of opinion that no reasonable cause of action is disclosed by the statement of claim against the parties moving, and the proper course is to dismiss the action against them.

Solicitor for Plaintiff: *Spencer Whitehead*, agent for *Milward & Co., Birmingham.*

Solicitors for *Hermon's* trustees, *Thomas Brewis*, and other parties: *Garrard, James, & Wolfe.*

Solicitors for the *Law Life Assurance Society*: *Walters, Deverell & Co.*

D. P.

NORTH, J.
1894
Aug. 11.

In re KIDD.
BROOMAN *v.* WITHALL.

[1891 K. 875.]

Locke King's Act (*Amendment Act*), 1877 (40 & 41 *Vict. c.* 34)—*Vendor's Lien—Building Agreement.*

A building agreement provided for leases with ground-rents up to £180 a year; and, at the option of the lessor, for further leases on payment by her of twenty-two years' purchase of the further ground-rents. She executed the option, and died before completion:—

Held, that her devisees took the land included in the agreement subject to discharging the amount payable in respect of the further leases.

THIS was the further consideration of an action for the administration of the estate of Mrs. *Bella Goss Pearson Kidd*, widow, who died in December, 1890, having made a will dated November, 1890. She was entitled in fee, subject to the contracts and leases mentioned below, to certain land at *Wood Green*. She devised the land at *Wood Green*, and other real estate, on trust to convert and invest the proceeds for the benefit of *Bella Laura Burt* and her children. The testatrix entered into an agreement dated the 10th of April, 1883, with *William Hodson*, under which *William Hodson* was to build houses on the *Wood Green* property, and the testatrix was to grant leases of twenty houses for ninety-nine years from Lady Day, 1883, at rents to the amount of £180 a year. The lessee undertook to build twenty houses in respect of which the ground-rents of £180 a year were to be reserved within four years. The agreement contained the following clause: "Provided always that if and when the lessee has taken leases of a sufficient number of houses to secure by the ground-rents thereby reserved the said total annual rent of £180, then the lessor will either convey to the lessee in fee simple in consideration of the due performance of this agreement and of the sum of £50 to be paid to the lessor all such parts of the said land coloured pink and marked A and B upon the said plan as shall not have been included in any lease, subject only to" certain covenants, "or (at the option of the lessor) the lessee

shall sell to the lessor the ground-rents to be created out of the land not then already leased when the same shall have been created at the price of twenty-two years' purchase of the amount of such ground-rents not being in any case more than one-sixth of what, in the opinion of the surveyor, shall be the actual rack-rent value of the houses on which the same shall be secured."

After twenty houses had been built and leases of them had been granted, reserving the total rent of £180 a year, the testatrix gave the executors of *William Hodson* written notice (dated the 31st of July, 1890) of her exercise of her option to purchase ground-rents out of the part of the premises not then leased by her. It was arranged in writing between the testatrix and the executors of *Hodson* before her death what leases she should grant of the land not yet leased to them. And seven leases were prepared of houses built on that part of the premises which was not included in the previous leases, at ground-rents amounting to £59 in all. The purchase of the ground-rents was carried out by the trustees of the testatrix's will. They granted the seven leases agreed upon, and paid the purchase-money, £1298, with a small amount of interest to *William Hodson's* executors, who, by deed, re-leased the premises to the trustees, subject to the leases. The Chief Clerk reserved for the decision of the Court the question whether the purchase-money of £1298 and interest ought to be paid for out of the proceeds of sale of the *Wood Green* premises, or out of the testatrix's personal estate.

Gent, for the Plaintiff, a person interested in the testatrix's residuary personal estate; and

Swinfen Eady, Q.C., and *Leeke*, for the Defendant, a person in the same interest:—

The devisees of the *Wood Green* estate can only take subject to the burden of paying off the £1298 due from the testatrix under the original agreement as modified by the exercise of the option and the subsequent arrangements by which the amount payable by her was fixed; that amount really was unpaid purchase-money for an interest in land sold by *Hodson* and his

NORTH, J. 1894 *In re* KIDD. BROOMAN *v.* WITHALL.

representatives, and for which they had a vendor's lien within the meaning of *Locke King's Act* (*Amendment Act*), 1877. The testatrix had, independently of her contract made by the exercise of the option, as far as related to the land intended to be subject to the seven additional leases, simply a right to the possession of the property after the expiration of the term of ninety-nine years, the right to the whole fruit of the property in the meantime belonged to the representatives of *Hodson*, subject to a contract to sell to the testatrix a rent of £59 a year to issue out of that property. They had a passive lien on the property; they had the power to say, "We will not give up our equitable right to the whole interest for the term until the purchase-money is paid."

Cozens-Hardy, Q.C., and *Gregory*, for Mrs. *Burt*:—

The relationship between *Hodson's* representatives and the testatrix was not that of vendor and purchaser. The testatrix had only one interest in the property; her contract to pay the £1298 imposed a simple debt on her, and did not create any charge on the land.

NORTH, J.:—

The Act known as *Locke King's Act* certainly did require a great deal of correction on matters in respect of which it must be said there were considerable blunders; and, as now amended, it is not perhaps expressed so as in terms exactly to meet the present case. I think, however, the present case is within the spirit of the enactment, and comes within a fair interpretation of the terms. [His Lordship stated the facts, and proceeded:—]

In my opinion, the result was that the lessor had two interests in the land. I do not assent to the argument of Mr. *Cozens-Hardy* that she had only one interest. Her interest may be divided into two: the right to receive £59 a year during the currency of the term, and the right to go into possession at the end of the term. The lessor had the right to go into possession under the building agreement at the end of the term independently of the proviso under which the option was exercised. But the right to receive the £59 a year during the currency of

the leases is an interest in land which the lessor could only get under the option reserved by the proviso. It seems to me that when the testatrix had given notice of the exercise of her option, and when the terms of the proposed seven leases had been defined and agreed upon, and the rents had been fixed, there was a complete bargain for a distinct interest, and all that remained was to work it out. The bargain being complete, and not worked out, the lessees were entitled to say, "We have a right to be paid our purchase-money." It seems to me they would have had the right to say they would not be parties to the necessary deeds to carry out the bargain unless they were paid what was due to them. The money due was unpaid purchase-money which, under the second of the series of Acts relating to the matter, is a burden on the land. I must say it would be very hard if the devisees of the land were entitled to have the leases granted, to receive the rents during the currency of the leases, and to have the £1298 paid out of the testatrix's personal estate. It is quite clear that the case is within the scope of what *Locke King's Act* and the amendment Acts intended to deal with. Whether the Acts have hit it is quite another question; but I think they have.

Solicitors for Plaintiff: *Sawyer & Ellis.*

Solicitors for Defendants: *W. H. Withall & Co.*

Solicitor for Mrs. *Burt*: *J. J. Chapman,* agent for *Long, Durnford, & Lovegrove, Windsor.*

D. P.

STIRLING, J.
1894
June 6.

In re BARNEY.
HARRISON *v.* BARNEY.

[1894 B. 1416.]

Drainage Expenses—Settled Lands—Capital Money—Tenant for Life—Trustee—Owner of Premises—Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *ss.* 2, 49, 90—"*Owners of Premises*"—*Will—Construction—*"*Repairs.*"

By the will of a testator, who died in 1846, certain freehold messuages were devised to trustees, their heirs and assigns, upon trust to permit *A.* and *B.* during their joint lives, and the survivor of them during his life, to hold, occupy, and enjoy the same, and to receive and take the rents thereof, and, after the death of the survivor, upon trust for the first and other sons of *B.* successively in strict settlement. During the life of one of the equitable tenants for life, the trustees applied certain capital moneys held by them upon similar trusts in payment of expenses incurred for drainage works in respect of the devised messuages, which were without such sufficient drains as specified in the *Public Health Act*, 1848, s. 49:—

Held, that as the trustees had the legal estate in the messuages, and were the persons entitled for the time being to receive the rack rents thereof (although in trust for the beneficiaries), they were "owners" within the definition of that term in the *Public Health Act*, 1848, s. 2, and had rightly paid the drainage expenses in question out of the capital moneys in their hands, but that as between the tenant for life and the remainderman the capital moneys so applied must be treated as a charge upon the messuages.

By a clause in his will the testator declared that the parties beneficially entitled to the rents and profits "of any of his houses" should keep the same in good and absolute repair:—

Held, that these drainage works were not "repairs" within the meaning of that clause.

ORIGINATING SUMMONS.

The testator, *John Barney*, by his will, dated the 14th of November, 1846 (*inter alia*), devised and bequeathed certain freehold messuages at *Fareham* and *Southampton* unto and to the use of his wife, his son *Stephen Barney*, and *Thomas Fox*, their heirs and assigns, upon trust to permit and suffer his wife and his son *Stephen* jointly and equally during their joint lives, and the survivor of them during his or her life, to have, hold, occupy, and enjoy the same, and to receive and take the rents, issues, and profits for their, her, or his own use and benefit, and after the

death of the survivor of them then upon trust for the first and every other son of the said *Stephen Barney* successively in strict settlement, and in default of such issue upon trusts in favour of the Defendant *John Douglas Barney* during his life, and after his death upon trust for his first and other sons in strict settlement, with divers equitable limitations over. And the testator gave the residue of his estate to his said wife and his son *Stephen Barney* absolutely, and, after appointing them and *Thomas Fox* his executors, by the last clause of his will, declared that "the parties beneficially entitled to the rents and profits of any of my houses or property shall see that the same be kept, or that they shall keep the same in good and absolute repair and properly insured from fire."

The testator died on the 15th of December, 1846.

Between the years 1861 and 1869 the trustees of the will, out of certain capital moneys in their hands forming part of the testator's estate and held by them upon trusts similar to those hereinbefore set forth, paid various sums amounting to £247 4*s.* 6*d.* for drainage expenses, incurred in respect of some of the messuages devised upon the trusts aforesaid, which were without sufficient drains, such sums being expenses which, under the provisions of the *Public Health Act*, 1848, ss. 49, 90, were payable by and recoverable from the (1) "owners" of the property in respect of which the drainage works had been executed.

The widow of the testator died in August, 1864, *Thomas Fox* in 1876, and *Stephen Barney* in 1892.

(1) Sect. 2 of the *Public Health Act*, 1848, is as follows: "The word 'owner' shall mean the person for the time being receiving the rack rent of the lands or premises in connexion with which the said word is used, whether on his own account or as agent or trustee for any other person, or who would so receive the same if such lands or premises were let at a rack rent."

The definition of the word "owner" in this section is the same as that given in sect. 4 of the *Public Health Act*, 1875 (38 & 39 Vict. c. 55), which Act contains in sects. 23 and 213 provisions in substance similar to those of sects. 49, 90 of the *Public Health Act*, 1848, the principal difference being that under sect. 49 the report of a surveyor was required, and that sect. 23 introduced a new provision in cases where the local authority find it less expensive to make a new sewer, and to cause house drains to empty therein, than to cause them to empty into any existing sewer.

STIRLING, J. 1894 *In re* BARNEY. HARRISON *v.* BARNEY.

This was an originating summons by the legal personal representative of *Stephen Barney* for the determination (*inter alia*) of the question whether the payment of the sums amounting to £247 4*s.* 6*d.*, or any part thereof, for these drainage expenses was a proper payment, or whether, according to the true construction of the will, it was unauthorized and constituted a breach of trust. The question was also raised whether these drainage expenses were not "repairs" within the meaning of the last clause in the will of the testator.

Douglas Barney, the present tenant for life under the will, was made Defendant to the summons.

Godefroi, in support of the summons:—

These drainage expenses were properly paid by the trustees in the first instance out of the capital moneys in their hands, irrespective of the consideration by whom they should ultimately be borne. The only question now is with reference to the incidence of them as between tenant for life and remainderman. It has never been decided, either under this Act or under the Act of 1875, that such expenses as these, which are for the benefit of the whole inheritance, should be borne by the tenant for life.

E. Beaumont, for the Defendant *Douglas Barney* and his infant son, the tenant in tail in remainder:—

These expenses might have been declared to be private improvement expenses, and levied upon the occupier under sect. 90 of the Act of 1848, and though there was no order of the local board in this behalf, still, as between persons claiming under the will, the expenses ought not to be charged on capital.

Creed, for a person entitled to a contingent equitable interest subsequent to the interest of the infant tenant in tail.

STIRLING, J.:—

I think that as in this case the trustees had the legal estate vested in them, and were consequently the legal owners of the property, the trustees were the persons for the time being to

receive the rack rents of the premises, if they were let at a rack rent. They were therefore, in my opinion, the "owners" of the property within the definition of the word "owner" in the 2nd section of the *Public Health Act*, 1848; and they might accordingly have been required under sect. 49 of that Act to construct such drains as should appear to be necessary; and if the requirement had not been complied with the necessary drainage works might have been done by the local board themselves. In that case the expenses incurred by the local board in so doing would have been recoverable from the trustees, and they would have been entitled to be recouped out of the estate of the testator. I do not think that the works in question were "repairs" within the meaning of the last clause in the will, and, in my opinion, the sums expended upon them by the trustees were properly paid out of the capital of the testator's estate, and must be treated as a charge upon the property.

Solicitors: *Alfred Peachey*, agent for *Frank Gillson, Fareham, Hants; Prior, Church, & Adams; Wynne & Son.*

W. W. K.

In re DEAKIN. STARKEY *v.* EYRES.

[1893 D. 1538.]

Will—Construction—Power to Appoint amongst "Relations" of Donee—Donee of Power Illegitimate—Class—Statutory Next of Kin—Lord Selborne's Act (37 & 38 *Vict. c.* 37).

The testator by his will, dated in 1854, gave all his property to his wife for life, and after her death directed the payment of legacies and gave a moiety of the residue of his property to his wife's "relations" as she might direct. The testator's wife was born out of wedlock; but her parents married after her birth and had other children, and she was always recognised by her parents as their child, and no difference was made by them between her and her natural brothers and sisters. The testator was aware of his wife's origin, and at the date of his will she was forty-seven years of age and childless. She survived the testator, and by her will, dated in 1891, purported to exercise the power in favour of children and grandchildren of her natural brothers and sisters:—

Held, (1.) That the word "relations" must be construed as meaning

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1894

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those persons who would have been her relations if she had been legitimate;

(2.) That the power was merely a distributive one, and, according to the rule established by the cases before *Lord Selborne's Act*, the class of relations amongst whom the widow could appoint was confined to her next of kin;

(3.) That that rule of construction had not been altered by *Lord Selborne's Act*.

In re Standley's Estate (1) not followed.

ADJOURNED SUMMONS.

Thomas Deakin by his will, dated the 6th of December, 1854, gave all his property to his wife for life; and after her death directed payment of certain legacies, and then gave one moiety of the residue "to my wife's relations as she may direct." He died on the 14th of February, 1855, leaving his wife *Lydia Deakin* him surviving.

Lydia Deakin by her will, dated the 11th of November, 1891, in exercise of the power conferred upon her by her husband's will, directed that the said moiety of his property should be divided into eight equal parts or shares, which she distributed as follows, *i.e.*, one of such eighth parts in equal shares to the children of her brother *Thomas Wilkinson*; another eighth part in equal shares to the children of her late sister *Margaret Deakin*; another eighth part in equal shares to the children of her late brother *John Wilkinson*; another eighth part to *John Oscar Wilkinson*, the natural son of her sister *Phœbe Williams*; another eighth part in equal shares to the children of her late brother *Samuel Wilkinson*; another eighth part in equal shares to the children of her late brother *George Wilkinson*; another eighth part in equal shares to the children of her late brother *William Wilkinson*; and she directed that the remaining eighth should be divided into three equal parts, and one-third part thereof should go to her niece *Jane*, the wife of *Henry Starkey*; another third part thereof to her nephew *Thomas Wilkinson*, the son of her late brother *Joseph Wilkinson*, and the remaining third part thereof to the three children of her niece *Sarah Edwards*, deceased, in equal shares.

She died on the 27th of November, 1892, all her brothers and

(1) Law Rep. 5 Eq. 303.

sisters except *George Wilkinson* (erroneously described in her will as her "late brother") having predeceased her.

Lydia Deakin was born in 1807 and was the daughter of *John Wilkinson* by *Jane Hanson*, then a single woman.

In May, 1808, *Jane Hanson* intermarried with *John Wilkinson*, who recognised *Lydia Deakin* as his child, and made no difference between her and the children born after the marriage. On the 13th of April, 1825, she intermarried with *Thomas Deakin*, but never had any children. It was proved that *Thomas Deakin* was aware that *Lydia Deakin* was illegitimate.

This was an originating summons taken out by the surviving executors and trustees of the respective wills of *Lydia Deakin* and *Thomas Deakin* for the determination (*inter alia*) of the question whether the several appointments or gifts of shares in the said moiety of the residuary estate of *Thomas Deakin* purporting to be made by the will of *Lydia Deakin*, or any and which of such appointments, were good and valid; and, in the event of the said appointments or gifts or any of them being held invalid, who were now entitled to the said moiety or to the share or shares purporting to be appointed by any such invalid appointment.

April 13. *Seddon*, for the trustees.

Arnold Herbert (*C. E. E. Jenkins*, with him), for the appointees under the will of *Lydia Deakin* other than *J. O. Wilkinson*:—

The appointments to the blood relations of the testatrix are good. The intention of the testator must be gathered from the will and from the circumstances known to him at its date. He knew that his wife could not have any legitimate relations, and must be taken to have intended to benefit persons who, though not legally relations, had recognised her and been recognised by him as such: *In re Jodrell* (1). The testator could not have intended to benefit his wife's children by another husband: *In re Harrison* (2).

Hastings, Q.C., and *R. J. Parker*, for the representatives of

(1) 44 Ch. D. 590. (2) [1894] 1 Ch. 561.

STIRLING, J. 1894 In re DEAKIN. STARKEY v. EYRES.

William and *John Deakin*, two brothers of the testator, *Thomas Deakin*:—

The gift is invalid, and there is an intestacy. Wherever the testator uses the word "children" or "relations" the word "legitimate" must be understood: *Hill* v. *Crook* (1); *Dorin* v. *Dorin* (2); *Re Saville's Trusts* (3).

If it was possible that *Lydia Deakin* might have legitimate relations, then it is clear that those who are illegitimate cannot take. Probability as to her having legitimate relations has nothing to do with it: *Jee* v. *Audley* (4). That, no doubt, was a case of perpetuities, but the principle is the same. See also *Paul* v. *Children* (5); *In re Overhill's Trust* (6).

The fact that the testator knew the circumstances of his wife's birth is immaterial. The appointment of the moiety of the testator's residue fails entirely, and there is an intestacy as to such moiety.

A. F. Peterson, for *J. O. Wilkinson*:—

If illegitimate relations are allowed to take, my client should not be excluded. If your Lordship is against me on that, then I say the gift fails altogether: *In re Standley's Estate* (7).

J. W. Clydesdale, for *Mary Hayden Dignum*, a beneficiary under the testator's will.

Jenkins, in reply:—

The cases as to "children" are not applicable, and only confuse the question. It was impossible in this case that *Lydia Deakin* should have legitimate relations, and the testator obviously intended to benefit his wife's blood relations.

STIRLING, J. (after stating the facts, continued):—

It is contended that the word "relations" in the will of *Thomas Deakin* means *primâ facie* legitimate relations; that although

(1) Law Rep. 6 H. L. 265.
(2) Ibid. 7 H. L. 568.
(3) 14 W. R. 603.
(4) 1 Cox, 324.
(5) Law Rep. 12 Eq. 16.
(6) 1 Sm. & Giff. 362.
(7) Law Rep. 5 Eq. 303.

Lydia Deakin had not at the date of *Thomas Deakin's* will any such relations, she might have had issue by a subsequent marriage who would have been legitimate relations of hers, and that under these circumstances *Thomas Deakin* cannot be taken to have authorized her to make an appointment in favour of persons who are not legally her relations. Arguments of a similar kind have been frequently urged, and have been dealt with in modern times in many cases, of which I desire to mention particularly *Crook* v. *Hill* (1) and *In re Jodrell* (2).

In *Crook* v. *Hill*, *James*, L.J., says (3): "The rules of law and of construction applicable to this case are—first, that a gift to children means a gift to the lawful children of a lawful marriage, unless (which is the second rule) there be something which, in express terms, or by what has been called 'necessary implication,' shews that the gift is to illegitimate children exclusively, or to illegitimate children to be included in a class with, or to a class of illegitimate children who are to take conjointly with, another class of legitimate children. It is agreeable to us to find so clear a rule laid down as to what is meant by 'necessary implication' as that which we find in Lord *Eldon's* judgment in the case of *Wilkinson* v. *Adam* (4); that is, that necessary implication means, not natural necessity, but so strong a probability of intention that a contrary intention cannot be supposed. The question, then, resolves itself into this: whether, having regard to the language of this will, guarding ourselves scrupulously against indulging in conjecture, or in an attempt to do what we think the testator would have done if he had been better informed or better advised, but taking into consideration the whole of the will and the whole of the surrounding circumstances at the time the will was made, which are legitimately to be brought in for the purpose of explaining his expressions, though not for the purpose of altering or adding to them, there is in this case so strong a probability of intention to include, or not to exclude, the children in question, as that a contrary intention cannot be supposed."

The decision of the Court of Appeal was affirmed by the

(1) Law Rep. 6 Ch. 311; 6 H. L. 265.
(2) 44 Ch. D. 590; [1891] A. C. 304.
(3) Law Rep. 6 Ch. 315.
(4) 1 V. & B. 422.

STIRLING, J. 1894 *In re* DEAKIN. STARKEY *v.* EYRES.

House of Lords (1), and the Lord Chancellor there takes nearly the same view as Lord Justice *James*. Lord *Cairns* puts it thus (2): "The term 'children' in a will *primâ facie* means legitimate children, and if there is nothing more in the will, the circumstance that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take. But there are two classes of cases in which that *primâ facie* interpretation is departed from. One class of cases is where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest. A familiar example of that might be given in this way: Suppose there is a bequest 'to the children of my daughter *Jane*,' *Jane* being dead, and having left illegitimate children, but having left no legitimate children. Then, inasmuch as the testator must be taken to have known the state of his family, and must be taken to have intended to benefit some children of his daughter *Jane*, and inasmuch as she had no children who could be benefited except illegitimate children, rather than that the bequest should fail altogether the Courts will hold that those illegitimate children are intended, and they will take under the term 'children.' . . . . The other class of cases is of this kind. Where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term 'children' not merely according to its *primâ facie* meaning of legitimate children, but according to a meaning which will apply to and which will include illegitimate children."

In re Jodrell (3) is a recent case. Lord *Halsbury*, in giving judgment in the Court of Appeal, says (4): "I do not know what the testator meant except by the words that he has used. I do not know that the law affords any presumption whether a testator intends to benefit those who are related to himself in the strict sense, or related to his wife. I do not know that the law presumes that he means to make a provision for those in respect of whom it may be said they are connected by blood, although not in every link of the pedigree, by wedlock. The

(1) Law Rep. 6 H. L. 265.
(2) Ibid. 282.
(3) 44 Ch. D. 590.
(4) Ibid. 605.

law makes no presumption, I believe, upon the subject; and it would be very strange if it did, because the law will allow you if you choose, expressly and in terms, to leave things to your wife's relations, or to leave things to persons who are not your legitimate descendants; and, inasmuch as the law permits both those things to be done expressly, I myself am wholly unable to understand in what way a Court of Construction is called upon to put particular interpretations upon particular words with reference to any supposed presumption that the law makes either way."

Lord Justice *Lindley* says (1): "The only principle that I know of is that which has been expressed before. Look at the words, avail yourself of such evidence as is legitimately admissible, and see what the testator has said, and expound it as best you can with reference to what is legitimately before you."

And Lord Justice *Bowen* says (2): "We were told that it was the law established by authority that, when a testator has used language in his will which designates the persons to take by the name of a tie which the law recognises, you must not include in the class even such persons as might popularly be comprehended in the tie, unless indeed you can see that the testator in the clearest and most unmistakable way has so said. It seems to me that the law as laid down in *Hill* v. *Crook* (3) by Lord *Cairns* is the true law,—and although I do not disguise from myself that many judges, from Lord *Eldon's* time down to the present, judges of the highest authority and of the greatest learning, have used language (so to speak) of warning, and language that amounts to more than Lord *Cairns* has said—have used language to the effect that you must, before you can include under the name which the law usually appropriates to a legitimate tie persons who stand outside that strict line, find a necessary inference, or a very clear intention to that effect—it seems to me that the only weight one can give to such language is to treat it not so much as a canon of construction as a counsel of caution to warn you in dealing with such cases not to give way to guesses or mere speculation as to the probabilities of an intention, but to act only on such evidence as can lead a reasonable man to a distinct

(1) 44 Ch. D. 610. (2) 44 Ch. D. 614.
(3) Law Rep. 6 H. L. 265, 285.

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conclusion. But I protest, that as soon as you see upon the will, read by the light of such extrinsic circumstances as you may survey, what the true construction is, and what the true intention expressed by the testator is, then your journey is performed."

That was affirmed in the House of Lords.

The law is also stated by Lord *Selborne* in a single sentence thus (*Dorin* v. *Dorin* (1)): "The word 'children' in a will means legitimate children, unless, when the facts are ascertained and applied to the words of the will, some repugnancy or inconsistency (and not merely some violation of a moral obligation or of a probable intention) would result from so interpreting them." This statement equally applies to the meaning of the word "relations." Now, among a "wife's relations" may be included her children or issue if she has any; but the word "relations" is a much wider term than issue, and certainly, according to its ordinary meaning, includes other persons than children or issue. It might, no doubt, be interpreted to mean "issue" if the context of the will afforded ground for so doing; but there is no such context in the will of *Thomas Deakin*. I must take it then, on the true construction of the will, that the testator intended to benefit other relations than her possible future issue. Legally no such other persons existed; but, inasmuch as the testator knew that his wife, after nearly thirty years of married life, was childless, and inasmuch as he knew that she was illegitimate, and consequently had no relations who would be benefited if the will were read in the strict legal sense of the word, it seems to me that the Court ought, in accordance with the principles laid down in *Crook* v. *Hill* (2) and *In re Jodrell* (3), to read the word "relations" otherwise than in its strict primary meaning. It is true that the present case does not, in point of decision, fall within those cases, for in both of them the Courts arrived at the meaning of the wills which they had to construe by using those wills as dictionaries for the purpose of ascertaining the meaning of the language used; whereas here the interpretation is arrived at by reading the language in the light of the surrounding circum-

(1) Law Rep. 7 H. L. 568, 577. (2) Law Rep. 6 Ch. 311; 6 H. L. 265.
(3) 44 Ch. D 590.

stances. This was done in the case of *In re Haseldine* (1), before the Court of Appeal, where, as it seems to me, the conclusion was arrived at on more slender grounds than exist in the present case. If, then, the word "relations" is to be read, as I think, in a secondary sense, I have no difficulty in holding that by his wife's relations the testator meant those persons who had recognised her and been recognised by her as relations, viz., the persons who would have been her relations in case her birth had taken place after instead of before marriage of *John Wilkinson* and *Jane* his wife.

The case of *In re Standley's Estate* (2), decided by Lord *Hatherley* when Vice-Chancellor, was relied upon as an authority adverse to the conclusion at which I have arrived. I must confess myself unable effectually to distinguish it; but it was decided before *Crook* v. *Hill* (3). The reasoning on which the decision was based appears to me to be inconsistent with the principles there laid down, and, notwithstanding the weight justly due to any decision of Lord *Hatherley*, I am unable to follow it, having regard to the more recent authorities, which are binding on me.

I think, therefore, that the appointments made by the will of *Lydia Deakin* are good, except that in favour of *John Oscar Wilkinson*, whom she describes as "the natural son of my sister *Phœbe Williams*." There is nothing either in the will or the external circumstances (so far as I am entitled to look at them) which would entitle me to draw the inference that the testator included him among the persons whom he designated as his wife's relations.

Following upon this decision the question then arose, and was reserved for further argument, whether the class of persons who could take under the description of "relations" of *Lydia Deakin* included all persons who at her death would have been related to her in blood in any degree had she been legitimate, or whether it was limited to such persons as would, at her death, have been her next of kin under the *Statutes of Distribution* had she been legitimate.

(1) 31 Ch. D. 511. (2) Law Rep. 5 Eq. 303.
(3) Law Rep. 6 Ch. 311; 6 H. L. 265.

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His Lordship having directed that there should be separate representation of persons who were strictly next of kin and those who were not, the further hearing of the summons was adjourned for that purpose.

July 24. *Seddon*, for the trustees :—

The question now is whether the class of persons to take under the power must be confined to the statutory next of kin of *Lydia Deakin*. That is, no doubt, the *primâ facie* meaning of the word "relations." According to the old rule, where a power to appoint among relations authorized selection by the donee, then the power could be exercised in favour of any relations; but where it was merely a distributive power, the donee could only appoint to the statutory next of kin: *Pope* v. *Whitcombe* (1). There has been no English decision since the passing of *Lord Selborne's Act* (37 & 38 Vict. c. 37).

Since 1874 every power can be treated as exclusive, so that there is now no reason for the rule. If the rule in *Pope* v. *Whitcombe* applies, then the power could only be exercised in favour of the class of statutory next of kin as if the donee of the power had been born in wedlock.

Any share as to which the appointment is invalid must go to the next of kin: *Wilson* v. *Duguid* (2).

C. E. E. Jenkins, for *George Oscar Wilkinson*, the son of *George Wilkinson* :—

On the true construction of *Thomas Deakin's* will, *Lydia Deakin* had a selective power. But if that be not the true construction, I submit that the effect of *Lord Selborne's Act* is to make the power selective, and the same results will follow.

[STIRLING, J. :—I cannot distinguish this power from that in *Pope* v. *Whitcombe*.]

Then upon the question of the statute. I submit that the rule which limited the word "relations," occurring in a power to the statutory next of kin, was merely a rule of convenience, because formerly under a distributive power the donee was

(1) 3 Mer. 689. (2) 24 Ch. D. 244.

obliged to give something to every one of the objects: *Grant* v. *Lynam* (1).

That rule has been altered by *Lord Selborne's Act*, which has swept away the distinction between powers which are selective and those which are distributive—so that the old rule of construction is gone. The word "relations" must be construed according to its ordinary meaning, and includes all relations not merely statutory next of kin.

A. F. Peterson, for the statutory next of kin:—

This is merely a distributive power, and the old rule of construction is applicable, so that only the next of kin according to the statute can take: *Lawlor* v. *Henderson* (2); *Farwell* on Powers (3).

Jenkins, in reply, referred to *Harding* v. *Glyn* (4) and *Brown* v. *Higgs* (5).

STIRLING, J. (after stating the facts and referring to his previous decision, continued):—

A further question now arises as to the validity of an appointment to the child or one of the children of a brother of the testatrix who was living at her death, and that question turns upon the meaning to be given to the word "relations" in the will of the testator. In one sense the child of a brother was, of course, a relation; but it was contended that in this will the word "relation" must receive a more limited construction, and must be confined to the statutory next of kin of the testatrix living at her death. The law on that point is certainly in a peculiar state, and I do not express any opinion as to whether it is entirely satisfactory or not; I simply have to administer it as I find it. The law is shortly stated by the Master of the Rolls in *Ireland* in *Lawlor* v. *Henderson* (6), where he says: "The word 'relations,' in gifts of this character, has received a settled meaning, and the only point is, whether the executors

(1) 4 Russ. 292.
(2) Ir. R. 10 Eq. 150.
(3) 2nd Ed. p. 505.
(4) 1 Atk. 469.
(5) 5 Ves. 495.
(6) Ir. R. 10 Eq. 151.

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had under the will a power of selection or a simple power of distribution. It is plain that in the latter case they must confine themselves to the class falling within the limits of the *Statute of Distribution*, subject, of course, to the consideration of the period when that class is to be ascertained. I am of opinion that the principle laid down in *Pope* v. *Whitcombe* (1) rules this case, and, having regard to it, I think that there was no power of selection, but one of distribution simply." That is to say, that in deciding as to the meaning of the word "relations" in cases of this kind you must consider, first, whether the donor of the power has conferred upon the donee an exclusive power or not. If he has conferred an exclusive power enabling the donee to select from a class one or more members to the exclusion of others, then, according to *Harding* v. *Glyn* (2) and *Grant* v. *Lynam* (3), the word has a wider meaning given to it, so that the donee can select any one who is a relation according to the usual meaning of the word in the English language. If, however, the power be not an exclusive one, then the Court puts a narrower meaning on the term. That was established by *Pope* v. *Whitcombe*, where the testator directed his wife to dispose of the residue amongst his, the testator's, relations in such manner as she should think fit, and it was held by the Master of the Rolls that the objects of the power must be confined to the next of kin.

The first point to be considered here is, whether the testator has conferred on the donee an exclusive power or a non-exclusive one. It seems to me that the power is non-exclusive, and that, in the language of the Master of the Rolls in *Ireland*, the testator merely gave his widow a power of distribution, and not one of selection; therefore, according to the cases as they stood before Lord *Selborne's Act*, the power could only be exercised in favour of the persons who constituted the next of kin of the widow living at her death. Then the question arises whether that Act has made any difference as regards the construction of the will or of the power. The Act is simply the completion of legislation which has repealed an old rule of law, viz., that

(1) 3 Mer. 689. (2) 1 Atk. 469.
(3) 4 Russ. 292.

where there was a non-exclusive power and an appointment was made in exercise of it, the donee of the power was compelled to give something to every object of the power, or to leave some sum unappointed so that it might go as in default of appointment. That rule was first broken in upon by a statute of 1830 (11 Geo. 4 & 1 Wm. 4, c. 46), which provided that no appointment made after the passing of the Act should be impeached on the ground that an unsubstantial, illusory, or nominal share only was thereby appointed to or left unappointed to devolve upon any one or more of the objects of such power. The effect of that was to compel the donee of a power of appointment either to appoint some sum, however small, to every object of the power, or to leave something unappointed so as to devolve as in default of appointment. That continued to be the law until in 1874 another Act was passed (*Lord Selborne's Act*), which provided (sect. 1) as follows:—

"No appointment, which from and after the passing of this Act shall be made in exercise of any power to appoint any property real or personal amongst several objects, shall be invalid at law or in equity on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual notwithstanding that any one or more of the objects shall not thereby or in default of appointment take a share or shares of the property subject to such power."

That relieves the donee of a power from the necessity of either making an appointment to every object of the power, or of leaving something unappointed. It does not purport to alter any rule of construction which has been laid down as to the meaning of powers, nor to affect the class of objects to take under them. The Act does not seem to me to be directed to such a question as I have to consider; there is nothing to shew that the Legislature had such a question as this in contemplation. It is said, however, that if we go back to the beginning of the series of cases of which *Lawlor* v. *Henderson* (1) is one of the latest, and try to ascertain the reasoning on which they were based, we shall arrive at the conclusion that if the law had been then the same as

(1) Ir. R. 10 Eq. 150.

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it now is the word "relations" would always be construed as it is when the power is exclusive.

I am not so persuaded. It is difficult to find the origin of the rule. *Harding* v. *Glyn* (1) is the first case, and no reasons are given for the decision. It seems to me that I ought not to speculate as to what might have been done if the law had been different from what it was when those early cases were decided. I hold that the class to take is the same as it would have been before the passing of the Act in question, viz., the statutory next of kin of the testatrix at her death.

Solicitors: *Coode, Kingdon, & Cotton*, agents for *W. C. Deakin, Northwich; Taylor, Hoare, & Taylor*, agents for *A. & J. E. Fletcher, Northwich; Busk & Co.*, agents for *Cooke, Winsford.*

G. A. S.

STIRLING,J. 1894 *May* 9, 23; *July* 28.

In re MALAM. MALAM *v.* HITCHENS.

[1893 M. 2191.]

Tenant for Life and Remainderman—Shares in Company subject to Trusts of Will—Declaration of Dividend—Issue of New Shares—Option to take Allotment in Lieu of Dividend on Old Shares—Exercise of Option by Trustees—Proceeds of Sale of New Shares—Capital or Income.

A testator, who died in 1889, gave his residuary estate to trustees upon trust for his widow for life, and, after her death, for division amongst others; and gave his trustees power to postpone conversion of any part of his property for so long as they should think fit. At the date of his death the testator was possessed of shares in a company. In 1893 the company, by special resolution, resolved to increase its capital by the issue of new shares, and empowered the directors to offer such new shares to the existing shareholders in payment or part payment of any dividend for the time being. A dividend was afterwards declared out of profits, which the company was in a position to pay in cash. Half of such dividend was paid in cash, and in respect of the balance an allotment of new shares was offered to the shareholders, and such as did not accept the offer received the remainder of the dividend in cash. The trustees of the will accepted the allotment, and allowed the new shares to be allotted to the tenant for life:—

Held, first, upon the evidence, that the company intended to distribute

(1) 1 Atk. 469.

its profits as dividend, and not to capitalize them; and, secondly, that the tenant for life was only entitled to so much of the value of the new shares as represented the dividend applied by the trustees in taking them up, the balance of such value forming part of the capital of the estate.

The principles laid down in *Bouch* v. *Sproule* (1) and *Rowley* v. *Unwin* (2) considered and applied.

ADJOURNED SUMMONS.

This was a summons taken out by persons entitled in remainder under the will of the testator, *Peter Malam*, to the *corpus* of his estate, for the determination (*inter alia*) of the question whether certain new shares in a company called *Brunner, Mond & Co., Limited*, allotted or offered to the Defendants, the trustees of the will in August, 1893, or the proceeds of the sale of the same, or any and what proportion thereof respectively, ought to be treated as capital or income of the testator's estate.

The testator by his will, dated the 4th of June, 1885, gave all his property to his trustees in trust to convert into money, and invest the proceeds in any investments authorized by law for trust funds, with power to vary such investments at their discretion, and to pay the income to his wife during widowhood, and, after her death or second marriage, to divide and pay the *corpus* between and to the persons therein mentioned, amongst whom were the Plaintiffs. The testator empowered his trustees to postpone the conversion of any part of his property for so long as they should think fit, and directed that the income of unconverted property should from the time of his death go in the same manner as the income of the proceeds thereof would have been applicable if the same had been converted.

The testator died on the 27th of March, 1889. His widow died early in 1894.

Brunner, Mond & Co., Limited, was a company incorporated under the *Companies Acts* as a company limited by shares.

At the time of the testator's death the capital of the company was £1,500,000, divided into shares of £10 each, and he was the registered holder of twenty such shares. These were in May, 1889, transferred into the names of the trustees of the will and still remained in their names; and on them the sum of £7 per share had been paid up. In June, 1890, the capital was increased

(1) 12 App. Cas. 385. (2) 2 K. & J. 138.

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by the issue of 7 per cent. preference shares of £10 each, of which five were allotted to the trustees; and these were fully paid.

The company was very prosperous, and for some years previously to 1893 had declared dividends on its ordinary capital of 50 per cent.

By article 6 of the company's articles of association it was provided as follows:—"The surplus profits of each half-year, after paying the said preference dividend, shall belong to the holders of the remaining (or ordinary) shares in proportion to the number of shares held by them respectively and according to the amount for the time being paid up or credited on such shares. The dividend to the preference shareholders being first secured, all questions as to the disposal of the surplus profits shall be determined by the votes of the holders of ordinary shares."

By article 29 it was expressly declared that the directors should be entrusted with and exercise and perform certain duties and powers, *inter alia*:—

"(K.) They may invest any of the moneys of the company not immediately required for the purposes thereof upon such securities and in such manner as they may think fit, and they may from time to time vary or realise such investments."

On the 20th of February, 1893, the following special resolution was passed by the company, and the same was confirmed on the 16th of March: "That the articles of association be altered and added to in manner following. Article 3 B: The nominal capital of the company shall be increased to £2,000,000 by the creation of new shares. (*a*) The directors may at their discretion issue any number of shares up to the nominal amount of unissued capital for the time being of the company, including unissued capital heretofore authorized, and may issue such shares from time to time as ordinary shares, or in such proportion of preference and ordinary shares, and, as regards the increase of capital hereby authorized, for such nominal amount per share being £10 or any smaller sum, and with or without premium, as the directors shall from time to time determine. (*b*) The directors may at their discretion offer to both or either classes of shareholders and on such terms and at such prices, but not at a discount, as the

directors shall from time to time determine, fully or partly paid-up ordinary and preference shares in payment of the whole or part of any dividend for the time being payable to shareholders of any class, and may issue such shares to those shareholders who accept the offer so made."

On the 9th of August, 1893, the half-yearly report of the company was issued. It was as follows:—"The balance sheet and profit and loss account certified by the auditors and now presented show a balance to the credit of profit and loss account on the working of the half-year ended on the 30th of June, 1893, of £251,219 7*s.* 10*d.*, which, with the amount of £172,754 13*s.* 10*d.* brought forward from the previous half-year, makes a total of £423,974 1*s.* 8*d.*

"The directors propose to deal with the above balance as follows:—

	£	*s.*	*d.*
Dividend on the preference capital at 7 per cent. per annum . . .	15,323	8	9
Dividend on the ordinary capital at 100 per cent. per annum . . .	316,250	0	0
Amount to be written off patents account	2,500	0	0
Balance to be carried forward . .	89,900	12	11
	423,974	1	8

"The directors particularly invite the attention of the shareholders to the accompanying circular as to proposed new issue of shares."

The circular referred to in the report was signed by the chairman of the company, and was as follows:—

"Acting upon the special resolution passed on the 20th of February last, and confirmed on the 16th of March last, the directors propose to offer to allot at par to both ordinary and preference shareholders a number of ordinary shares of the nominal value of £10, on which £2 10*s.* per share is to be paid, to rank for dividend from the 1st of July, 1893. The directors propose to issue to the shareholders dividend warrants for one-half of the dividend to be declared at the half-yearly meeting,

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and, with the consent of the shareholders, to apply the other half in payment of the £2 10*s.* per share on the new issue. In respect, therefore, of each sum of £2 10*s.* of dividend so dealt with each shareholder will receive one ordinary £10 share with £2 10*s.* paid thereon. In case of fractions of £2 10*s.* it is proposed that the shareholder shall be entitled to the benefit of one-tenth of an ordinary share for each complete 5*s.*, and any excess will be paid in cash. As fractions of shares cannot be dealt with on the share register it will be necessary for each shareholder entitled to fractions either to sell them or to buy as many as will make up a share. The secretary will in due course send out letters of allotment in a convenient form, and he will up to the 30th of September next be authorized to give a letter of allotment for a new share in exchange for the requisite number of fractions.

"Those who do not wish to avail themselves of the allotment of the new issue will receive the balance of their dividend to be declared at the half-yearly meeting immediately on returning their allotment letters to the secretary with a notice to that effect.

"The directors reserve to themselves the right to pay in cash the above balance of dividend and to cancel the allotment in cases where the shareholder does not send in an acceptance of the allotment before the 30th of September, 1893."

Among the items of property and assets set out in the report (amounting in the whole to £2,009,515 17*s.* 4*d.*) were "investments, £331,810 18*s.* 7*d.*," and "cash in bank and in hand, £130,298 18*s.* 5*d.*" At the meeting held on the 21st of August, 1893, a dividend on the ordinary capital was declared at the rate of 100 per cent., and on the preference capital at 7 per cent.

Together with the report and the above-mentioned circular, the following letter, signed by the chairman and dated the 9th of August, 1893, was also sent to each shareholder:—

"I beg to hand you herewith the letter of allotment in your favour of shares in this company, and I take the opportunity to state shortly the courses open to you.

"You can accept the allotment of shares, in which case it is absolutely necessary you should return the letter of allotment to me before the 30th of September next, with the memorandum

of acceptance endorsed, duly signed, and the directors will then apply the balance of your dividend declared to-day towards payment of the amount due on the new shares, and will issue to you a share certificate with that amount paid on the shares. Or if you prefer not to accept the allotment, and inform me to that effect, and return me the allotment letter with the memorandum of acceptance unsigned, the allotment will be cancelled, and the above balance of your dividend will be forwarded to you. Or you may sell your right to an allotment, in which case the buyer from you will stand in your place and under the same conditions, and the above balance of your dividend will be paid on the new shares for his benefit. In the absence of any communication from you before the 30th of September, the directors reserve to themselves the right to treat your silence as an election on your part not to accept the allotment, and the directors may act as if you had declined the allotment. In case fractions of a share should be allotted to you, you can either return the allotment letters and receive their par value, or sell them, or buy other allotments of fractions to make up a complete share, which will be dealt with as mentioned above.

"As it is possible you may have had no experience of allotment letters issued under somewhat similar circumstances, I may add for your guidance that owing to the company's shares being at a considerable premium, the allotment letters have a value much greater than their par value, and that the company's brokers will be pleased to negotiate the sale or purchase of allotment letters of shares or fractions."

The allotment offered to the trustees of the testator's will was of fourteen and three-tenths shares, which were quoted at the time of allotment at £19 10*s.* per share, being a premium of £17.

The trustees had treated the right to this allotment as the property of the tenant for life, and renounced their right to the shares in her favour, and fourteen shares were accordingly allotted to her by the company in October, 1893.

It was contended by the persons entitled to the *corpus* of the testator's estate that the trustees were wrong in so doing, and that the new shares either formed part of the testator's estate, or, at all events, that they did so subject to the payment to the

STIRLING,J. tenant for life of the amount of dividend to which she would have been entitled if the option of taking shares had not been exercised.

1894

In re MALAM.

MALAM *v.* HITCHENS.

C. E. E. Jenkins, for the Plaintiffs :—

It is not quite clear that the decision in *Bouch* v. *Sproule* (1) covers this case. It was there decided that if a company, which has power to capitalize its profits, does so by retaining them and issuing new shares to the shareholders, all the shareholders are bound, and in the case of settled shares the tenant for life would take nothing in lieu of the dividends which might have been paid. It is necessary to see what the company has really done in each case. The trustees are trustees for all parties, and must hold benefits accruing to the estate with an even hand. What has been done is this: the trustees were entitled to elect either to receive the dividends or to apply for the new shares. They in fact appropriated the dividends in payment for the shares. The shares must form part of the *corpus*, but the tenant for life may be entitled to a charge upon them for the amount of the dividends so appropriated: *Rowley* v. *Unwin* (2); *In re Northage* (3); *Re Tindal* (4).

It has been decided by Vice-Chancellor *Robinson* in the matter of this very company that the tenant for life under the will in question was entitled to the full dividend declared, and that the balance of the proceeds of the sale of the allotment should be treated as capital: *Re Gurney* (5).

Hastings, Q.C., and *H. Terrell*, for the trustees :—

This case is governed by *Bouch* v. *Sproule*. The dividends here have not really been capitalized by the company, and they remain as income: *In re Alsbury* (6). *In re Northage* is not a decision on the point. In *Re Tindal* there was no declaration of dividend at all; and the same remark applies to *In re Barton's Trust* (7).

(1) 12 App. Cas. 385.
(2) 2 K. & J. 138, 141.
(3) 60 L. J. (Ch.) 488.
(4) 9 Times L. R. 24.
(5) *Liverpool Mercury*, March 17, 1894.
(6) 45 Ch. D. 237.
(7) Law Rep. 5 Eq. 238.

Clydesdale, for the personal representative of the tenant for life.

Jenkins, in reply.

1894. July 28. STIRLING, J. (after stating the facts, continued):—

The general principle applicable is thus stated in *Bouch* v. *Sproule* (1): "When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company which has the power either of distributing its profits as dividends, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him, the testator or settlor, in the shares, and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, enures to the benefit of all who are interested in the capital." It was further laid down by the House of Lords in the same case that in considering whether a company has distributed its accumulated profits as dividends or converted them into capital regard must be paid both to the form and the substance of the transaction; and that House, upon the question of fact, came to a different conclusion from the Court of Appeal, and held that shares allotted, under circumstances which bear a resemblance to those of the present case, were an accretion to the *corpus* of the testator's estate, to no part of which the tenant for life was entitled. The principle of law thus laid down is binding on me; the decision on the question of fact is not, unless indeed the facts be substantially the same; and in my judgment there are material differences between the facts of the present case and those which were dealt with in *Bouch* v. *Sproule*.

In the first place, the company had in the present case assets not actually employed in the business amply sufficient to pay the whole dividend declared in cash. The amount required for the dividends was £331,573 8*s.* 9*d.*; among the assets are "cash

(1) 29 Ch. D. 635, 653; 12 App. Cas. 385, 397.

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in bank and in hand, £130,298; debts owing to the company, £146,899; and investments (by which I understand investments made in pursuance of Art. 29 K), £331,810 18*s.* 7*d.*

Consequently by application of part only of the cash and a realization of part only of the investments, the dividends declared might readily have been paid.

Again, the resolutions passed in February, 1893, point to an increase of capital to the extent of £500,000, which much exceeds the whole dividend declared, not to speak of only half of the dividend declared on the ordinary shares. Those resolutions further contemplate the offer of the new capital to shareholders "in payment," as it is termed, of the whole or part of any dividend. The offer of the new capital was actually made to preference as well as ordinary shareholders, although the preference shareholders were not entitled to anything more than 7 per cent. per annum. I do not think that it was intended to capitalize any existing assets of the company under the guise of first declaring a dividend and then issuing new shares to the existing shareholders, and I think the object was to give any shareholder who might desire it the opportunity of increasing his holding in the company (that being a benefit), and to do so in a way which would at once secure to the company the desired increase of capital without putting the shareholders under an obligation to find the money out of their own pockets. That this was the object in the case of the preference shareholders seems clear; and the conclusion at which I arrive on the question of fact is that the company by the resolutions passed on the 21st of August, 1893, did really intend to distribute its accumulated profits as dividends to the extent to which those resolutions purported to sanction such a division. In my opinion, therefore, the tenant for life was, on the principle laid down in *Bouch* v. *Sproule* (1), entitled to the dividend declared by those resolutions. It is said, however, that she was entitled, not merely to this, but to the shares allotted in respect of the dividend. Those shares were not, however, in the first instance offered to her, but to the trustees. The option of determining whether the offer of those shares should be accepted or not lay

(1) 12 App. Cas. 385.

with the trustees and not with the tenant for life. I apprehend that under the circumstances of the case it was their duty to accept the shares, and Lord *Watson* appears to have been of this opinion in *Bouch* v. *Sproule* (1). The question then is, on whose behalf is this option to be exercised? On behalf of the tenant for life only, or of all the persons interested? If an offer were made to the trustees unconnected with the payment of any dividend, the option would have to be exercised on behalf of all the beneficiaries, and if the instrument creating the trust did not authorize the retention of the shares, it would be the duty of the trustees to sell them and deal with the proceeds of sale as capital: and in fact such a course has been repeatedly authorized by the Court.

In *Rowley* v. *Unwin* (2), new shares, designated "quarter shares," were allotted to trustees of a marriage settlement in respect of shares standing in their names. They accepted the allotment, and paid the calls on the shares out of the separate income of the wife. The trustees afterwards sold the new shares, and invested the proceeds in Consols, and it was held that the stock so purchased was subject to the trusts of the settlement as *corpus*. Lord *Hatherley* said in giving judgment (3): "With regard to the 18 quarter shares, there can be no doubt that such shares, notwithstanding the calls were paid out of the wife's separate income, followed the trust. They became subject to the trusts of the settlement as *corpus*. It is analogous to the case of a tenant for life renewing leasehold property, and advancing money for the fine due on the renewal. A tenant for life, under such circumstances, would only have a charge on the property for the amount so advanced. I must declare, that the stock purchased with the proceeds of the sale of the 18 quarter shares is subject to the trusts of the settlement, the plaintiff having a lien thereon for the amount of the calls paid out of her separate income." In the present case the dividend was declared and the option offered simultaneously: but still it seems to me that the principle laid down in *Rowley* v. *Unwin* is applicable, and that the proceeds of the realization of the shares

(1) 12 App. Cas. 385.
(2) 2 K. & J. 138.
(3) 2 K. & J. 141.

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should be applied in payment first of the dividend (to which the tenant for life is entitled by reason of the acts of the company), and the balance ought to be applied as capital. That appears to have been the view taken by Mr. Justice *North* in *In re Northage* (1), and Mr. Justice *Chitty* in *Re Tindal* (2). Against this it was said that it was held by the Court of Appeal in *Bouch* v. *Sproule* (3) that the tenant for life was entitled to the whole value of the shares, and that is so; but I find no approval of that view in the House of Lords: and Lord *Bramwell* expressly dissented from it. He said (4): "I agree with the first answer of the Court of Appeal, 'that the bonus of £2 10*s.* was income of the estate of *William Bouch*,' to this extent—that in reason and in right it should have been so treated." In the present case, I, on the facts, come to the conclusion that the dividend was income of the estate. "But," he then goes on, "I differ from the second answer, which is a sort of conclusion from the first. It is an erroneous conclusion in my opinion. It assumes that £7 10*s.* bought a new share. It did not. For the price of the new share was that sum and the diminished value of the old shares." It appears, both from the report of that case before the Court of Appeal, and from the speeches in the House of Lords, that immediately before the allotment of the new shares, the old shares were at a premium of twenty-one, and after it they fell to a premium of fourteen. With a view to ascertaining whether there has been any serious fall in the value of the shares in the present case, I have, since the argument been furnished (at my own request) by the parties with statements of the prices of these shares as given in *Liverpool* weekly official share lists, from which it appears that so soon as the old shares were quoted ex dividend (including the option of the new shares) there was a very considerable fall in the price of the old shares, which continued up to the date of the allotment, the depreciation somewhat exceeding the price of the new shares. If it be the fact, as is stated by one of the parties, that there was a rise in the spring in anticipation of such an allotment, it does not seem to me to affect the result. I am of

(1) 60 L. J. (Ch.) 488.
(2) 9 Times L. R. 24.
(3) 29 Ch. D. 635.
(4) 12 App. Cas. 407.

opinion, therefore, that the tenant for life was not entitled to any portion of the proceeds of sale beyond the amount of the dividend.

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Solicitors for trustees: *Indermaur & Brown*, agents for *Gardner & Son, Manchester.*

Solicitors for Plaintiffs: *Taylor, Hoare, & Taylor*, agents for *A. and J. E. Fletcher, Northwich.*

Solicitor for personal representatives of widow: *W. B. Glasier*, agent for *W. Bancroft, Northwich.*

G. A. S.

HAMILTON *v.* VAUGHAN-SHERRIN ELECTRICAL ENGINEERING COMPANY.

STIRLING, J. 1894 *July* 26, 31.

[1892 H. 1863.]

Infant—Contract to take Shares in Company—Allotment—Repudiation during Infancy — Winding-up — Right to Recover Money Paid in respect of Shares.

The Plaintiff, while an infant, applied for shares in a company and paid the amount due on application. The shares were duly allotted to her, and she paid the amount due on allotment. No dividends were received by her, nor did she attend any meetings of the company. Six weeks after allotment, while still under age, she repudiated the contract, and asked for repayment of the money paid by her to the company. She subsequently brought an action to recover the money. The company then went into liquidation, and the liquidator removed her name from the register of shareholders:—

Held, that, having derived no advantage under the contract, the consideration had wholly failed, and she was entitled to prove in the winding-up for the amount paid by her in respect of the shares.

ADJOURNED SUMMONS.

The *Vaughan-Sherrin Electrical Engineering Company, Limited*, was registered on the 16th of August, 1890, under the *Companies Act*, 1862, having articles of association in the form in Table A. On the faith of a prospectus issued by the company the Plaintiff, Miss *Hamilton*, who was then of the age of eighteen, applied for shares, and paid £20, the amount payable on application. On the 6th of October, 1890, twenty ordinary shares of £5 each were

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allotted to her, and on the 18th of October she paid £40, being the amount payable on allotment. Her name was duly entered on the register as the holder of the shares.

On the 18th of November, 1890, she wrote a letter to the secretary of the company withdrawing her application and requiring repayment of the £60 paid by her to the company, but received no answer. She attended no meeting of the company, nor did she receive any dividends on the shares. On the 19th of May, 1892, she, by her next friend, issued the writ in this action, claiming (1.) a declaration that the allotment of the twenty shares standing in her name in the register of shareholders of the Defendant company was void; (2.) that the register of the company might be rectified by striking out the name of the Plaintiff as a shareholder in respect of the said twenty shares; (3.) that the Defendant company might be ordered to repay to the Plaintiff the sum of £60 paid by her to the company in respect of the shares, together with interest at 5 per cent.; and (4.) that the Defendant company might be restrained by injunction from enforcing any call made, or to be made, on the Plaintiff in respect of the shares.

On the 10th of June, 1892, the company went into voluntary liquidation, and on the 27th of June the liquidator removed the Plaintiff's name from the register of shareholders.

The action now came on upon a summons in the winding-up, for the purpose of obtaining the decision of the Court upon the question whether the Plaintiff was entitled to the return of the £60 paid by her to the company.

Reginald Hughes, for the Plaintiff:—

The Plaintiff, being an infant, has paid money for something which is not a necessary, and, there being a total absence of consideration, she is entitled to recover the money so paid. No dividend has been paid to her, and the liquidator has properly taken her name off the register, so that she cannot share in the assets of the company. She has derived no intermediate advantage under the contract, and is entitled to have the money returned to her: *Corpe* v. *Overton* (1).

(1) 10 Bing. 252.

P. F. Wheeler, for the liquidator:—

An infant who pays money without valuable consideration cannot get it back: *Earl of Buckinghamshire* v. *Drury* (1); *Holmes* v. *Blogg* (2); *Ex parte Taylor* (3). There was here a distinct legal consideration. The shares were allotted to the Plaintiff, and she had the right to receive dividends if declared, and to attend meetings. The consideration in such a case need not necessarily be of a marketable value.

Where the contract is executory an infant can recover; but where, as here, it is executed, she cannot: *Leake* on Contracts (4). The Plaintiff is not assisted by the *Infants Relief Act*, 1874.

Valentini v. *Canali* (5) shews that the principle of the old cases is not to be limited by the Act.

Reginald Hughes, in reply:—

In all the cases where an infant has been held not entitled to recover there has been part performance and enjoyment of some advantage by the infant under the contract.

STIRLING, J. (after stating the facts, continued):—

The case now comes on in order that I may decide whether or not the Plaintiff is entitled to a return of £60 paid by her to the company. This is claimed on the ground that there has been a total failure of consideration.

Three cases have been cited before me on this point. The first is *Holmes* v. *Blogg* (6). There the plaintiff brought an action to recover a sum paid by him during infancy to the defendant, who was lessor to the plaintiff and to one *Taylor*, with whom the plaintiff was in partnership. The lease was granted to the plaintiff and *Taylor*, and £157 10*s.* was paid by the plaintiff as a premium. Under the lease, *Taylor* and the plaintiff occupied the premises for three months. The infant afterwards avoided the lease, and then brought an action to recover the premium. *Gibbs*, C.J., in delivering the judgment of the Court, refers to an expression of opinion by Lord *Mansfield* in the House of Lords,

(1) 2 Eden, 60, 72.
(2) 8 Taunt. 508.
(3) 8 D. M. & G. 254.
(4) 3rd Ed. pp. 476, 477.
(5) 24 Q. B. D. 166.
(6) 8 Taunt. 508, 511.

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where he says: "If an infant pays money with his own hand without a valuable consideration for it, he cannot get it back again," and it was held that the infant was not entitled to recover. In *Ex parte Taylor* (1), which was a case of a very similar nature, an infant had entered into an agreement for a partnership and paid a premium on entering. He devoted much time to the business, and received an allowance weekly, amounting altogether to £172, but before he came of age he disaffirmed the contract. It was held that he could not prove for the premium in the bankruptcy of his late partner, on the ground that the contract had been part performed on each side, and the consideration had not wholly failed. The former of those two cases was considered in *Corpe* v. *Overton* (2). In that case the plaintiff, while an infant, signed a written agreement to enter into a partnership which was not to commence at once, but at a future date, and he paid down £100 as deposit. Between the date of the agreement and the date when the partnership was to commence the plaintiff came of age, revoked the agreement and rescinded the contract, and brought an action to recover the deposit. In opposition to his claim *Holmes* v. *Blogg* (3) was relied upon, but the whole of the Judges composing the Court distinguished that case. *Tindal*, C.J., said (4): "In *Holmes* v. *Blogg*, the infant had paid £157 as his share of the consideration for a lease of premises in which he and his partner carried on the business of shoemaking. They occupied the premises from March till June, when the infant, coming of age, dissolved the partnership, relinquished the business, and sought to recover back the money he had paid the lessor for his lease. In that case, therefore, the sum of money sought to be recovered back, as having been paid without consideration, appeared to have been paid for something available, that is, for three months' enjoyment of the premises let to him and his partner; and the plaintiff could not put the lessor again into the same situation. And though several general expressions are dropped by the Chief Justice in delivering his judgment, yet when he comes to apply them to the subject before the Court, he gives them a less extensive

(1) 8 D. M. & G. 254.
(2) 10 Bing. 252.
(3) 8 Taunt. 508.
(4) 10 Bing. 255.

latitude. After referring to the opinion of Lord *Mansfield*, he goes on: 'What is the point here? That an infant having paid money on a valuable consideration, and having partially enjoyed the consideration, seeks to receive it back.' The ground, therefore, of the judgment in *Holmes* v. *Blogg* (1) was, that the infant had received something of value for the money he had paid, and that he could not put the defendant in the same position as before." Then, after discussing the facts in that case, he adds (2): "As it is plain, therefore, that the infant had a right to rescind the contract, the only point we have to look to with reference to *Holmes* v. *Blogg* is, whether he had derived any intermediate advantage from it. Now the partnership was not to be entered into till January, 1833; and in the meanwhile the infant had derived no advantage whatever from the contract." And he held that the infant was entitled to recover. *Gaselee*, J., said: "I consider the present case as clearly distinguishable from *Holmes* v. *Blogg*." *Bosanquet*, J., said: "We are far from impeaching the judgment of the Court in *Holmes* v. *Blogg*, as applicable to the facts of that case. There, the infant had paid a sum of money as part of the consideration for a lease of premises in which he carried on business with a partner. The premises were, in fact, occupied for twelve weeks; but if they had been occupied for any other period, there would have been no difference in principle, and the plaintiff could not recover back sums from the outlay of which he had derived an advantage. There is no reason, therefore, for finding fault with that decision. It is, however, a general rule, that upon an entire failure of consideration, a party is entitled to recover back money paid, and it cannot be said that in this respect an infant is in a worse situation than others. Here, the infant has derived no benefit whatever from the contract, the consideration of which has wholly failed." And *Alderson*, J., said (3): "In this, the case is clearly distinguishable from *Holmes* v. *Blogg*. Here the infant has had no enjoyment of any advantage from the contract: in *Holmes* v. *Blogg* he had enjoyment, for a period, of premises demised to him; and so far was in the same situation

(1) 8 Taunt. 508. (2) 10 Bing. 257.
(3) 10 Bing. 259.

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as if he had paid for expensive clothes or other articles not necessary, and after wearing them had brought an action for the price. In such an action he could not be allowed to recover, although the tradesman, if unpaid, could not have enforced payment."

It is to be observed that all the learned Judges who dealt with the case distinguished it from *Holmes* v. *Blogg* (1) on the ground that in that case there had been actual enjoyment of the demised premises. They did not say that the mere demise itself, in the absence of occupation, would have been enough, and it seems to me that the true rule to be drawn from the cases is to consider whether the infant has derived any real advantage under the contract.

In the present case there was no advantage to the infant. Certainly there was no pecuniary advantage to her. She took no part in the management of the company and did not attend any meetings. No doubt there was an allotment of shares, and her name was placed on the register. It seems to me that that is not an advantage within the rule of *Corpe* v. *Overton* (2). The consideration has totally failed and the Plaintiff is entitled to recover, *i.e.*, to prove for the amount in the winding-up.

Solicitors: *Hughes & Masterman; J. B. Purchase.*

(1) 8 Taunt. 508. (2) 10 Bing. 252.

G. A. S.

In re HUDDLESTON. BRUNO *v.* EYSTON.

[1894 H. 1253.]

KEKEWICH, J.

1894

May 10, 24; *June* 12.

Power of Appointment—Special Power—Will—General Bequest—Execution of Power—Intention—Evidence as to state of Property—Admissibility.

A testatrix, having a special power of appointment by deed or will over personal estate in favour of her children, by her will directed that "all my property of every kind" should be divided among her children in certain shares, but made no express reference to her power:—

Held, that the will did not operate as an execution of the power; and that, the gift being general, an affidavit shewing the state of the testatrix's property at the date of her will and of her death was not admissible as evidence of her intention.

EDWARD HUDDLESTON, who died in 1852, by his will bequeathed his residuary personal estate to trustees in trust, as to one-fourth share thereof for his daughter *Agnes*, Countess *Faà de Bruno*, for her life for her separate use, and after her death for such of her children as she should by deed or will appoint, and in default of such appointment for her children and their issue *per stirpes* equally.

Agnes, Countess *Faà de Bruno*, had four children, a son and three daughters, all of whom survived the testator. The son was still living, and had four children, who were infants. Two of the daughters had died spinsters, one in her mother's lifetime and the other since her mother's death; the third daughter married Signor *Ricci*, and was still living.

The Countess died in June, 1892, having, in May, 1892, made a will as follows:—

"I undersigned, being in the full possession of my mental faculties, direct that all my property of every kind, including 'rentes,' certificates, securities or investments, &c., deposited with my bankers and trustees, *Glyn, Mills, Witham, Lambert & Co.*, of *London*, and, in a word, all I may be seised of at the time of my death, nothing being excluded or excepted, shall be divided as follows": Then followed directions for the division

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of her estate, two shares going to her two surviving daughters, and the residue to her son for life, with remainder to his children. The testatrix made no reference in her will to the special power of appointment given to her by her father.

This was an originating summons by the son of the Countess, in his own right, and as administrator of his two deceased sisters, and also as administrator with the will annexed of the Countess, against the trustees of *Huddleston's* will, Mrs. *Ricci*, and the four infant children of the Plaintiff, the son, to have it determined—(1.) whether the will of the Countess was a valid exercise of the special power of appointment given to her by *Huddleston's* will; and (2.), if not, whether the Defendants, the trustees of *Huddleston's* will, should pay one-fourth of the Countess's share of the residue under that will to Mrs. *Ricci*, and the remaining three-fourths to the Plaintiff, the son.

The only property of her own that the Countess died possessed of was a sum of £458 cash, part of which consisted of a small cash balance at her bankers, *Glyn & Co.*

From an affidavit by a member of the firm of *Witham, Lambert & Roskell*, who had been the solicitors to the Countess, and were now solicitors to the Defendants, it appeared that the share of residue under *Huddleston's* will, subject to the Countess's special power of appointment, was of very considerable value, consisting of a sum of about £10,000 invested on mortgage securities, about £2300 invested in railway stock, and a small sum of Consols; and that at the dates of the will and death of the Countess the certificates of the railway stock and a power of attorney relating to the Consols were on deposit with *Glyn & Co.* in the names of the trustees of *Huddleston's* will, the mortgage securities being in the custody of Messrs. *Witham, Lambert & Roskell.*

The summons now came on for hearing.

Dundas Gardiner, for the Plaintiff, stated the case.

George Lawrence, for the Defendants:—

I submit that the will of the Countess operated as an execution of the special power conferred on her by the will of her

father. The Court will look at the whole of her will and ascertain therefrom whether she intended that the property subject to the power should pass; and if she did so intend, then the power is executed: *In re Mills* (1), approved by the Court of Appeal in *In re Williams* (2). There is in this gift a sufficient reference to the property subject to the power, within the language of *Wood*, V.-C., in *In re Davids' Trusts* (3). The testatrix intended to designate that property which, at the time she made her will, she knew to be in the hands of Messrs. *Glyn*. The words of the will from "rentes" to "*London*" would, to use the words of Sir *William Grant* in *Bennett* v. *Aburrow* (4), be "wholly inoperative unless applied to the power." *In re Mattingley's Trusts* (5) and *Webb* v. *Honnor* (6), which were referred to by Mr. Justice *Kay* in *In re Mills*, related to gifts in general terms, and are therefore obviously distinguishable from the present case. Here the words from "rentes" to "*London*" are introduced parenthetically, and the gift is a general gift of all the testatrix's property, including certain specific things, which are in fact the property subject to the power. I ask the Court to hold that these words constitute a specific gift of those funds which the testatrix, at the time when she made her will, knew to be in the hands of her bankers and trustees; and if that be so, it is clear on the authorities that her will is a good execution of the power. But it is not necessary to go so far as that. Whether the gift be specific or not, it is sufficient if, on the whole will, the Court can come to the conclusion that the testatrix intended that the property subject to the power should pass.

Dundas Gardiner, in reply:—

My contention is that the will of the Countess is not an execution of the special power.

No doubt the Court must look at the whole will, but it must look at the will alone, and ascertain whether the will shews on its face an intention to exercise the power, and no evidence as to

(1) 34 Ch. D. 186.
(2) 42 Ch. D. 93.
(3) Joh. 495.
(4) 8 Ves. 609, 615.
(5) 2 J. & H. 426.
(6) 1 Jac. & W. 352.

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the state of the property at the date of the will or at the death of the testatrix can be regarded: *Nannock* v. *Horton* (1); *Jones* v. *Curry* (2). The gift is a gift of "my" property, not of property over which the testatrix had a power of appointment; it is merely an enumeration of the items of which that property may consist at the time when the will takes effect. In order to bring the case within the principle of the decision of Mr. Justice *Kay* in *In re Mills* (3) it would be necessary to shew that the words from "rentes" to "*London*" relate exclusively to the property subject to the power, and it is quite clear from the language of that learned Judge (4) that if those words would apply to any other funds, the power is not executed. But any securities which the testatrix happened to have with Messrs. *Glyn* would have passed under this gift: see *In re Davids' Trusts* (5); and as a matter of fact she had a cash balance at her private account in their hands at the time of her death.

Moreover, the gift in the will of the testatrix would extend to her issue born after her death, whereas the power of appointment is restricted to issue born in her lifetime; and that is a strong circumstance to shew that the testatrix did not intend to exercise the power.

At the conclusion of the foregoing argument, the further hearing of the summons was adjourned for argument upon the question whether the evidence as to the nature of the property subject to the disposal of the Countess was admissible in order to prove that, by the words "including 'rentes,' certificates, securities or investments, &c., deposited with my bankers and trustees," she must have intended to refer to the funds held by *Glyn & Co.* and *Witham & Co.* in the names and on behalf of the trustees of *Huddleston's* will, and over which she had the special power of appointment.

This question accordingly came on for argument on the 12th of June, 1894.

(1) 7 Ves. 391, 398.
(2) 1 Swans. 66.
(3) 34 Ch. D. 186.
(4) Ibid. 193.
(5) Joh. 495, 498, 499.

Dundas Gardiner, for the Plaintiff:—

It is clear from the authorities that, except possibly in a case of latent ambiguity, evidence outside the will is not admissible to shew what a testator's property consisted of at the date of his will or of his death in order to ascertain whether he was exercising his power or not: *Andrews* v. *Emmot* (1); *Nannock* v. *Horton* (2); *Jones* v. *Tucker* (3); *Davies* v. *Thorns* (4).

George Lawrence, for the Defendants:—

The authorities only go to this, that if you find a general gift of personalty, or any gift of personalty that is not specific, then you cannot, for the purpose of seeing whether the testator is exercising a power, go into the question of the adequacy of his own property to answer the gift; but that, if the gift is *primâ facie* specific, then you can adduce evidence to shew whether the property he affects to dispose of is in fact his own: *Wigram* on Extrinsic Evidence, Prop. 5 (5); *Innes* v. *Sayer* (6); *Jones* v. *Curry* (7); *Shuttleworth* v. *Greaves* (8). Here, I submit, the gift is *primâ facie* specific; that is to say, it is a gift by the testatrix of specific property in the hands of her bankers and trustees at the date of her will. Neither *Bennett* v. *Aburrow* (9), *In re Davids' Trusts* (10), *In re Gratwick's Trusts* (11), *In re Mattingley's Trusts* (12), *Webb* v. *Honnor* (13), or *Jones* v. *Tucker* are opposed to my contention.

KEKEWICH, J.:—

The question I have to decide is whether the will of the Countess *de Bruno* must be properly regarded as an execution of the special power vested in her. The power was given by the will of *Edward Huddleston*, the father of the testatrix. Certain property was thereby settled upon his daughter, the Countess, for life with a power of appointment vested in her in favour of her

(1) 2 Bro. C. C. 297, 300, 303.
(2) 7 Ves. 391.
(3) 2 Mer. 533.
(4) 3 De G. & Sm. 347.
(5) 3rd Ed. p. 51; 4th Ed. p. 65.
(6) 3 Mac. & G. 606, 614–5.
(7) 1 Swans. 66, 72–3.
(8) 4 My. & Cr. 35, 37–8.
(9) 8 Ves. 609.
(10) Joh. 495.
(11) Law Rep. 1 Eq. 177.
(12) 2 J. & H. 426.
(13) 1 Jac. & W. 352.

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certain children. I say "certain children," because, for the present purpose, I am not concerned to consider whether all the persons in whose favour she has exercised the power—if she has exercised it at all—are objects of the power or not. That is a further question. But she had a special power of appointment, that is to say, a power of selection among certain objects, to some of whom, at any rate, she has purported to give benefits by her will. So that, if she has properly executed the power in favour of persons who are undoubtedly objects, it is a good execution to that extent, though not as to the whole. She makes her will in these terms. [His Lordship read the bequest above stated, and continued:—]

And then she goes on to give certain directions for the disposition of the property. There is no doubt that, in some respects, the clause I have read is unintelligible and requires some explanation in order to understand it. One does know that *Glyn & Mills* are bankers, and that *Witham, Lambert & Co.* are solicitors; but one cannot, even so, jump to the conclusion that when the testatrix says "my bankers and trustees, *Glyn, Mills, Witham, Lambert & Co.*," she means the solicitors to the trust and the bankers to the trust. I mention that in order to shew that there are, to a great extent, expressions requiring explanation. But, before proceeding further, I have to consider what is the purpose and extent of this gift standing alone, construing it as I can easily construe it. In the first place her direction is as to "all my property of every kind." Then follows this curious clause, "including rentes, certificates, securities or investments, &c."—which of course would pass, without those words of inclusion, by the previous words "all my property." And she winds up in this way, "and, in a word, all I may be seised of at the time of my death, nothing being excluded or excepted." As I construe the direction, nothing would have been excluded or excepted had she stopped at the words "all my property." Apparently the only reason for adding the general words at the end was that she thought she had introduced some doubt as to the generality of the first part of the direction by having mentioned particular property. She might have thought that the words "all my property" included the

particular things mentioned but did not include things not *ejusdem generis* and so she added something to shew that the generality of the direction was not to be disturbed. To my mind, there can be no doubt about that passing every shred of property which could by the law of *England* pass by testamentary disposition. There could be no question about an intestacy as to any part of the lady's property.

Then is this gift anything more than a general residuary devise and bequest? I cannot myself see how it can be anything but that. It is argued that it is specific, and not only specific, but *primâ facie* specific. I do not intend to refer to the authorities as to what constitutes a specific gift, such as *Robertson* v. *Broadbent* (1), in the House of Lords, in which Lord Chancellor *Selborne* discusses the question. I do not think it necessary to go into that question or the definition of the word "specific": but, whatever else "specific" means, it must mean something segregated and distinguished from the generality. Here I certainly have the words "Rentes, certificates, securities or investments," but those are only included in the generality; and what is included in the generality cannot surely be segregated or distinguished from the generality. Therefore, what the testatrix disposes of here is the whole property of which she could dispose. Then, could this include property over which she had a special power of disposition? Is there any indication here that she intended to include that? There is no reference to the instrument creating the power; but that is not wanted. There is no reference to the property included in the power: but that also is not wanted. Is there anything to shew that she was exercising the power? So far as I can see, there is not a word, whereas she distinctly speaks of "my" property, "my" trustees, and all "I" may be seised of. It may be somewhat technical to rely upon the word "seised" in a lady's home-drawn will; but the word "seisin" has such a definite, technical meaning in law that one cannot help noticing it in passing. This lady was disposing of property which was her own, and not property over which she had a power and which was not her own.

Therefore, reading the will alone, I do not see my way to

(1) 8 App. Cas. 812.

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saying that this is an exercise of the special power. On the other hand, I can see reasons for holding that this is not an exercise of the special power at all.

Then there is evidence in the shape of an affidavit by the solicitor to the lady to prove that she meant to describe the funds held by her bankers and solicitors over which she had the special power. On the last occasion I thought it right not to allow that evidence to be used without further argument. That evidence went to shew that the situation of the property which the lady purported to dispose of, it being deposited with Messrs. *Witham & Co.* and Messrs. *Glyn & Co.*, was such that the testatrix must have intended to refer to it, and that she was disposing of, not only "my" property, but that over which she had a power. But I have to consider whether that evidence is admissible. As against its admissibility certain cases are cited—cases which are ingrained in the law of the Court, come down from ancient times; and from time to time those cases have been quoted and approved. Take, for example, *Innes* v. *Sayer* (1). In that case all the authorities are cited in argument, and the Lord Chancellor, in giving judgment, refers to some of them by name, and particularly to *Andrews* v. *Emmot* (2), *Nannock* v. *Horton* (3), and *Jones* v. *Tucker* (4). The Lord Chancellor says this (5): "It is true that there have been many cases in which the Court has held that a power was not executed even where the words might have referred to the power; but in those cases, the words could be fully satisfied by referring them to the testator's own property; and there have been also various cases in which the Court has refused to take into consideration the state of the testator's property at the date of his will, or at the time of his death; but in these cases the disposition was not *primâ facie* specific, as I think it is in this will." So that I have the high authority of that case for saying that the rule under which evidence as to the state of the testator's property is admissible in order to shew whether he intended to exercise his power, is applicable to a specific gift, and not to a general gift. Therefore on the law, as

(1) 3 Mac. & G. 606.
(2) 2 Bro. C. C. 297.
(3) 7 Ves. 391.
(4) 2 Mer. 533.
(5) 3 Mac. & G. 615.

settled by that case alone, this evidence is inadmissible. The rule has been laid down for potent reasons, which I do not think it is my duty or office either to explain or to criticize. The law being settled, I have nothing to do but to follow it. I hold, therefore, that the evidence is inadmissible.

The costs of all parties must be paid out of the fund, and the residue will be divided into fourths: one-fourth going to Mrs. *Ricci*, and three-fourths to the Plaintiff.

Solicitors: *L. J. V. Amos; Witham, Lambert, & Roskell.*

G. I. F. C.

In re SPRINGFIELD. CHAMBERLIN *v.* SPRINGFIELD.

[1894 S. 1392.]

Will—Bequest to Next of Kin "after the death of A."—Life Estate by Implication.

Under a bequest, after the death of *A.*, to the testator's next of kin according to the statute, *A.* takes a life estate by implication, upon the reasoning of *Cotton*, L.J., in *Ralph* v. *Carrick* (1), as applied to a devise, after the death of *A.*, to the testator's heirs; but not so where the bequest is, after the death of *A.*, to persons who happen to be some members of the class of the testator's next of kin.

GEORGE OSBORN SPRINGFIELD, of *Matlash Hall, Norfolk*, of which he was yearly tenant, by his will, dated the 7th of November, 1892, after appointing two persons his executors and trustees, devised to them his real estate upon trusts for his son *Thomas Osborn Springfield*, then an infant; and he bequeathed his household furniture and effects in and about his residence at his death to his wife *Evaleen St. Clair Springfield*, during her life, provided she should reside at *Matlash Hall* aforesaid; and after her decease, or in the event of her ceasing to reside at *Matlash Hall*, he gave the said furniture and effects to his said son absolutely, with a gift over, in the event of the son predeceasing his said wife, to his two daughters *Barbara St. Clair Springfield* and *Eily St. Clair Springfield*. And, after a gift of

(1) 11 Ch. D. 873.

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certain other property in favour of his said son, the testator gave and bequeathed his residuary personal estate to his trustees upon trust for investment, and out of the income to pay an annuity of £50 to each of his said two daughters respectively on their attaining twenty-one or marrying, "for and during the remainder of the life of my wife *Evaleen St. Clair Springfield*, if she shall be then living," to be paid quarterly: "And from and after the decease of my said wife, then I direct my said trustees to call in and convert into money my said residuary personal estate, and, after paying the costs and charges of such conversion, to pay and divide the same unto and equally between my son *Thomas Osborn Springfield* and my said two daughters, *Barbara St. Clair Springfield* and *Eily St. Clair Springfield*, on their attaining the age of twenty-one years, or on my said daughters marrying, share and share alike; but if my said son shall not live to attain the age of twenty-one years, or if only one of my said daughters shall live to attain that age or marry, then I give my said residuary personal estate unto the survivor of my said son and two daughters living to attain the age of twenty-one years, or, being a daughter, marrying as aforesaid, absolutely." Then followed a proviso that if his said son or each of his said daughters should die in his (the testator's) lifetime, "or in the lifetime of my said wife," leaving children who should survive him (the testator) and attain twenty-one or marry, such children should take their parent's share. Then followed an ultimate gift over to a third daughter, Mrs. *Chamberlin*, absolutely.

The testator died on the 22nd of November, 1893, leaving surviving him his wife, and his said four children.

This was a summons by the sole acting executor and trustee of the will against the testator's widow and children, raising the question, amongst others, whether, as the widow had ceased to reside at *Matlash Hall*, the income of the residuary personal estate during her life was payable to her, or was undisposed of: in other words, whether the widow took a life interest by implication.

Drury, for the Plaintiffs.

Hadley, for the widow:—

The widow takes a life estate by implication: *Bird* v. *Hunsdon* (1); *Hammond* v. *Neame* (2); *Blackwell* v. *Bull* (3). *Ralph* v. *Carrick* (4) will probably be cited against me; but there, not only was the will different from that in the present case, but the Court, and particularly Lord Justice *Cotton*, was dealing with a different class of case, namely, a gift, after the death of *A.*, to the testator's heir or next of kin jointly with other persons. *Ralph* v. *Carrick* does not prevent the Court from holding that a gift, such as we have here, to some of the next of kin alone, after the death of *A.*, creates a life estate by implication in *A.*, and it is to be noticed that all the next of kin are named in the will and have benefits conferred on them. But, apart from that, it appears to have been the clear intention of the testator that his wife should receive the surplus income after providing for the annuities.

Method, for the children, was not called upon.

KEKEWICH, J.:—

Mr. *Hadley* has truly said that there are indications in this will that the widow should have an estate for life. There are, no doubt, indications to that effect; but that does not allow one to construe the will against the testator's meaning. Whatever others may be allowed to do, a Judge is not allowed to guess. Therefore, I pass that by.

The other point is more difficult. It is said that there is an implication of a gift to the wife for life, because of the way in which the testator disposes of his residuary personal estate after her death. It is very true that the doctrine of giving life estates by implication is not to be extended. At any rate, this seems to be in accordance with the large bead-roll of authorities, including in particular *Ralph* v. *Carrick*, before Vice-Chancellor *Hall* and the Court of Appeal; and although there is no doubt some distinction between that case and the present,

(1) 2 Swans. 342.
(2) 1 Swans. 35.
(3) 1 Keen, 176.
(4) 11 Ch. D. 873.

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and though I believe the particular point arising here has not been dealt with in any other reported case, and therefore is in one aspect novel, yet it appears to me that the reasoning of the Court of Appeal in *Ralph* v. *Carrick* (1) really covers this case.

Where a man devises real estate, after the death of *A.*, to his, the testator's, heirs, it is said that the heir is not to take until after the death of *A.*; and the result cannot be arrived at without giving *A.* a life estate, otherwise the heir would take immediately, which presumably is not intended. If, on the other hand, the testator gives the estate after the death of *A.* to the heir and another jointly, then the implication is not necessary, because the heir does not take by force of the gift, but, independently of the gift, he takes the whole estate, whereas under the gift he only takes a share in the estate. That distinction is dealt with by Lord Justice *Cotton* in his judgment in *Ralph* v. *Carrick*. The same result would of course apply to a gift to next of kin and to a stranger. Here I have a case where the gift is not to next of kin and a stranger, but to next of kin alone. Mr. *Hadley* has argued that the next of kin take by force of some words; but the gift that is to take effect immediately after the death of the wife is not to all the class of next of kin, but only to some members of that class. If one, therefore, is included, it is because the others do not take. A gift to next of kin is, to some extent, in a different position to that of a gift to the heir; but Lord Justice *Cotton's* reasoning, that is to say, his *ratio decidendi*, seems to apply to this novel case. What is the presumed intention of a gift of personal estate to the testator's next of kin according to the statute after the death of *A.*? It is this: "I do not intend my personal estate to go immediately on my death to the persons entitled to it by law, that is, according to the *Statute of Distributions*." If, therefore, you find that those persons are only to take after the death of *A.*, then it may be impossible to give effect to that intention except by implying a gift of a life estate to that person after whose death the next of kin are to take according to the terms of the will. But if, according to the terms of the will, the next of kin are not to take according to the statute, then the reasoning falls to the ground,

(1) 11 Ch. D. 873.

and you cannot imply a gift to *A.*, whether a wife or not, without doing violence to the terms of the will.

That may not be entirely consistent with the judgment in *Ralph* v. *Carrick* (1), but it works out Lord Justice *Cotton's* reasoning so as to make it applicable to the case before me. Here I have, no doubt, a will such as that described by the Master of the Rolls in *Ralph* v. *Carrick*. As was done in that case, I must take the will in this case as I find it. It is confessedly inaccurate; but, construing it as it stands, and not being able to resist the cogent reasoning to which I have referred, or to find any express gift of a life estate, I cannot imply a life estate to the wife here.

The result is that, as to that part of the property, there is an intestacy during the life of the wife.

Solicitors: *Johnson & Master; Church.*

G. I. F. C.

In re HARMAN. LLOYD *v.* TARDY.

[1893 H. 2376.]

Will—General Power of Appointment—Real Estate—Partition Action—Sale — Proceeds liable to be laid out in Purchase of Land — Conversion — Re-investment in Stock—French Will — Domiciled Frenchman—General Bequest—Exercise of Power of Appointment — Wills Act, 1837 (1 *Vict. c.* 26), *s.* 27—*Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18), *s.* 34—*Practice —Originating Summons, Form of—Questions, Specific or General.*

An English lady, domiciled in *France*, having a general power of appointment over a sum of Metropolitan Board of Works Stock, representing a share of proceeds of real estate in *England* sold under the judgment in a partition action—such proceeds being liable to be laid out in the purchase of land under sect. 34 of the *Settled Estates Act*, 1877—by her will in the French language gave "all her properties and chattels (*tous les biens et droits mobiliers*)" to *T.* absolutely:—

Held, that the will must be construed as disposing of everything in the form of personal estate over which the testatrix had a general power

(1) 11 Ch. D. 873.

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of disposition; and that, the fund being personal estate in form (*Chandler* v. *Pocock* (1)), it passed by the will.

An originating summons to obtain the opinion of the Court upon the construction of an instrument should state the questions categorically, and not in such general terms as, "who are or is entitled to" the property in question.

EZEKIEL HARMAN, by his will dated the 26th of August, 1843, gave and bequeathed unto trustees (among certain legacies for his six daughters) the sum of £15,000, free from legacy duty, upon trust to invest the same in or upon the funds and securities therein mentioned, and pay the income thereof to his daughter *Emma Harman* during her life for her sole and separate use, without power of anticipation, and after her death in trust for her children or other issue as she should by deed or will appoint, and in default of appointment for her children equally at twenty-one or marriage. And in default of such children, as to the said last-mentioned trust funds and securities, and the income thereof, in trust for such person and persons and in such manner in all respects as his said daughter *Emma*, whether covert or sole, should by deed or will direct or appoint; and in default of such direction or appointment, in trust for her next of kin according to the statute. And the testator devised his mansion-house called *Bowden Park House*, and the messuages, farms, lands, and hereditaments to the same belonging, or considered part of the *Bowden Park* estate, and all other his estates and hereditaments in the parish of *Lacock*, in the county of *Wilts* (subject to a term of 500 years created by the said will for raising an annuity (which failed), and the legacies given by his said will, and his debts and testamentary expenses), to the use of his son, *Ezekiel Dickinson Harman*, his heirs and assigns. And he devised his residuary real estate to such of his sons as should be living at his death, equally.

By a codicil, dated the 13th of August, 1844, the testator revoked the devise to his son *Ezekiel Dickinson Harman* of the *Bowden Park* estate and other hereditaments in the parish of *Lacock*, in the county of *Wilts*, and (subject to the term of 500 years) devised the same to his said son for life, with remainder

(1) 15 Ch. D. 491; 16 Ch. D. 648.

to his children in tail; and in default of such issue then, as to three-ninths thereof, to his three other sons as therein mentioned; and as to the remaining six-ninths to the use of his trustees upon such trusts and under and subject to such powers, provisoes, and declarations for the benefit of his six daughters (including *Emma Harman*) respectively and their respective children or issue and appointees as were in his said will contained or expressed with regard to the respective legacies or sums of money thereby bequeathed to or vested in the trustees for the benefit of his said six daughters, and their respective children or other issue, so far as such trusts, powers, provisoes, and declarations could or might be applicable to real estate, each of his daughters respectively, and her children respectively, or child or other issue, or her appointees, taking only one of such ninths.

The testator died on the 28th of May, 1845. His daughter *Emma* survived him and married *Leopold Jean Pascal Cazin*, a domiciled Frenchman.

By the *Harman's Bowden Park Estate Act*, 1852, the *Bowden Park* estate was vested in trustees for sale, and the surplus of the proceeds of such sale, after payment of a mortgage of £8000, was directed to be invested in the purchase of certain freehold lands.

Under that Act the *Bowden Park* estate was accordingly sold, and the net proceeds were invested in the purchase of land as directed, the land purchased being conveyed to and upon the original uses and trusts of the *Bowden Park* estate.

On the 3rd of July, 1858, *L. J. P. Cazin* died, leaving his wife *Emma Cazin* him surviving.

Ezekiel Dickinson Harman died on the 7th of January, 1876, without issue. On the 7th of June, 1876, an action was commenced for the partition or sale of the lands purchased as above mentioned; and under the judgment in that action, dated the 15th of July, 1876, the lands were sold and the moneys arising from such sale were paid into Court to the credit of the action, "Proceeds of Sale of Real Estate."

In May, 1878, the share of *Emma Cazin* was ordered to be paid out to the trustees of the will, to be applied by them to

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some one or more of the purposes mentioned in sect. 34 of the *Settled Estates Act*, 1877; and until it could be so applied, to be invested as directed by sect. 36, the income to be paid to *Emma Cazin* during her life. Accordingly that share, amounting to £509 5*s.*, was paid out to the trustees, and invested by them in £508 2*s.* 1*d.* Metropolitan Board of Works 3½ per cent. Stock, this fund representing *Emma Cazin's* share in the *Bowden Park* estate under the will.

On the 4th of October, 1892, *Emma Cazin*, having property of her own besides that over which she had the general power, executed a will in the French language, the following being the English translation:—

"I give and bequeath to Madame *Antoinette Robillot*, wife of Mr. *Pierre Tardy*, *Restaurateur*, with whom she lives at *Nevers Rue du Pont Cizeau*, No. 21, all the properties and chattels (*tous les biens et droits mobiliers*) which I shall leave at my decease, and which shall form part of my succession, without any exception or reserve, in whatever localities and place the said properties and rights (*biens et droits*) find themselves placed, due and situate (*assis, dûs et situés*). Madame *Tardy* will enjoy and dispose of the said properties as of things belonging to her in full ownership from the day of my decease. Such is my last will."

Emma Cazin died on the 22nd of October, 1892, a domiciled Frenchwoman, without ever having had any issue. On the 15th of May, 1893, letters of administration, with a copy annexed of the English translation of the will, were granted to Madame *Tardy's* attorney.

This was an originating summons taken out by the trustees of the will of *Ezekiel Harman* against Madame *Tardy* and *Emma Cazin's* administrator, and also against three persons as representing numerous parties entitled to *Emma Cazin's* share in default of appointment by her, to determine—

"Who are or is now entitled to the fund in the hands of the Plaintiffs representing the share of *Emma Cazin*, widow, deceased, in the *Bowden Park* estate devised by the said will and codicil (of *Ezekiel Harman*) and in what shares and proportions."

The question for argument was whether *Emma Cazin's* will

was an execution of the general power of appointment given her by the will of *Ezekiel Harman*.

On the hearing of the summons affidavits by French advocates were read to the effect that the terms of *Emma Cazin's* will were sufficient to pass all property which she had at her disposal.

Stock, for the Plaintiffs.

Warmington, Q.C., and *C. T. Mitchell*, for the Defendant, Madame *Tardy*:—

We claim to be entitled to the fund in the hands of the Plaintiffs under Madame *Cazin's* will, which operates as an execution of her general power of appointment: *Wills Act* (1 Vict. c. 26), s. 27. The fund is personal estate and passes under the words "*tous les biens et droits mobiliers*." It cannot be treated as real estate; though it was liable to re-investment in land, no direction, consent or request for such re-investment was ever given by Madame *Cazin*, the tenant for life, which could effect a conversion, and she must be taken to have elected to take the fund as personal estate.

At the date of her will and of her death the fund was existing as personal estate *de facto*, and it still remains so: *Chandler* v. *Pocock* (1); *Mordaunt* v. *Benwell* (2); *Wallace* v. *Greenwood* (3); *Meek* v. *Devenish* (4); *Partition Act*, 1868, s. 8; *Settled Estates Act*, 1877, s. 34. *In re Duke of Cleveland's Settled Estates* (5), which may be cited against us, is entirely different from *Chandler* v. *Pocock*, which is the case that governs the present.

[KEKEWICH, J.:—This is a will in the French language; but I apprehend that the grammatical rules of construction are applicable to a will whatever may be its language: *Di Sora* v. *Phillipps* (6).]

This is the will of an English lady domiciled in *France*, and may be construed according to the English law. The case is different where you are dealing with the will of a domiciled

(1) 15 Ch. D. 491; 16 Ch. D. 648, 652.
(2) 19 Ch. D. 302.
(3) 16 Ch. D. 362.
(4) 6 Ch. D. 566.
(5) [1893] 3 Ch. 244.
(6) 10 H. L. C. 624, 627–9.

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Frenchman: there you must decide according to the law of the domicil.

T. H. Carson, for the Defendants representing the parties entitled in default of appointment by Madame *Cazin*:—

First, this fund must be treated as real estate. There was no one to consent to a sale under the judgment of 1876. A sale under the *Partition Act* does not effect a conversion unless there is some one to consent to the sale: there is no conversion where the sale is only under an order of the Court. The effect of the order of 1878 was to keep the fund as real estate. In the Probate Court the proceeds of property sold under the *Settled Estates Acts* and not yet converted into realty are not regarded as personal estate: *In the Goods of Lloyd* (1). *Chandler* v. *Pocock* (2) is not against me, for the *ratio decidendi* was that the lady had applied to have the fund transferred into her own name, thus shewing an intention to make it her own personal estate. Here Madame *Cazin* did nothing to shew an intention to treat the fund as money. If it ever did become money, it did not become so, at all events, before her death. *In re Duke of Cleveland's Settled Estates* (3) is in my favour. Here the lady has done nothing beyond making a will; but, as she had other property on which the will operated, it cannot be regarded as having affected this fund. My second point is one of construction. Madame *Cazin* was domiciled in *France*, therefore her *mobilia sequuntur personam:* and the *Wills Act* can only apply to persons having an English domicil and dealing with personal property in *England: Bremer* v. *Freeman* (4). Accordingly *Chandler* v. *Pocock* cannot be applied to this case at all, and, assuming this fund is personal estate, this will is not an exercise of the power, sect. 27 of the *Wills Act* having no application. Neither does the will pass this fund, if real estate, for the disposition of a man's real estate depends on the *lex loci* and not on the law of his domicil: *Freke* v. *Lord Carbery* (5). If, then, this is a French will, it has no effect whatever upon the

(1) 9 P. D. 65.
(2) 16 Ch. D. 648.
(3) [1893] 3 Ch. 244.
(4) 10 Moo. P. C. 306.
(5) Law Rep. 16 Eq. 461, 467.

testatrix's real estate in *England*. The language of the will is not applicable to real estate at all, and no extrinsic evidence is admissible to shew that it is so applicable: *Shore* v. *Wilson* (1).

Warmington, in reply:—

The *lex loci* is only applicable to something that has a situation: here we are dealing with something that has not a situation —only a sum of money; and this is "personal estate" to which the observations of Sir *G. Jessel* and Lord Justice *James* in *Chandler* v. *Pocock* (2) apply.

1894. June 28. KEKEWICH, J.:—

Treating this as an English will, I am of opinion that it exercises the general power of appointment conferred on the testatrix by the will of *Ezekiel Harman*. The case seems to me to be governed by that of *Chandler* v. *Pocock*. But it is not an English will. It is the will of a Frenchwoman: and in construing it I must have regard to French law and to the rules of construction by which a French Court would be guided in determining the meaning and effect of such an instrument. Here there is one great difficulty—so great as to affect the value of all the expert evidence and to suggest a doubt whether much of that evidence has any proper application to the matter in hand. The French law apparently knows nothing of the distinction between a general power of testamentary disposition and property. The distinction has in English law been largely affected by the enactment of the *Wills Act* (1 Vict. c. 26), but it is familiar to English lawyers and still influences the construction of wills, whereas in *France* it is not recognised at all. I have endeavoured to treat the case and regard the evidence as if I also saw no difference between a general power of disposition and property; and, so treating it, I have to determine whether a will in such language as has been used by the testatrix, and pointing primarily, if not altogether, to what we term "personal estate," passes that which existed in the form of personal estate but was liable to be invested in land, and therefore may, according to the language of English law, be properly described as real estate.

(1) 9 Cl. & F. 355, 555-6. (2) 15 Ch. D. 491; 16 Ch. D. 648.

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It would be perfectly safe here again to refer to the principle of *Chandler* v. *Pocock* (1) as judicial authority for the interpretation of language apart from technical rules of law; but I will not content myself with that. I am satisfied from the evidence that this will ought to be construed as disposing of everything in the form of personal estate over which the testatrix had a power of disposition, notwithstanding that by some technical rules another character might properly be attributed to it.

I hold, therefore, that the power was well exercised, and that the fund in question passes by the operation of the will to the appointee.

I desire to point out that the summons is not framed as originating summonses ought to be framed. It only asks, in a general form, "who are or is now entitled to the fund in the hands of the Plaintiffs representing the share of the said *Emma Cazin*, deceased, in the *Bowden Park* estate devised by the said will and codicil, and in what shares and proportions." I object to that form of summons, though I will not now require an amendment. These summonses ought to be framed stating specific questions, and asking categorically for the decision of the Court upon them. It is a common practice to require them to be reduced to a proper form before the order is drawn up; but, as the property is small, I shall not require that to be done here. I hope my remarks will not be thrown away, for this summons is certainly not in the form in which summonses are usually drawn up by those who understand how things are done in Chambers.

Solicitors: *Paines, Blyth, & Huxtable; Nokes & Stammers.*

(1) 15 Ch. D. 491; 16 Ch. D. 648.

G. I. F. C.

In re SHAW.
BRIDGES *v.* SHAW.

KEKEWICH, J.

1894

July 14, 20.

[1893 S. 5074.]

Will—Probate Action—Costs—Order of Probate Division for Payment of Costs "out of the Estate"—Real Estate, Liability of—Administration Action—Jurisdiction.

By the judgment in a Probate action a will, containing specific devises of real estate but no residuary devise, was established against the heir-at-law as Defendant, whose costs were ordered to be paid "out of the estate," but no order was made as to the costs of the Plaintiffs propounding the will:—

Held, in a Chancery administration action, that "out of the estate" meant out of the personal estate only, the Probate Division having no jurisdiction to order payment of costs out of real estate; and that—the personal estate being insufficient—none of the costs of the Probate action were payable out of the real estate, whether specifically devised or undisposed of.

HENRY SHAW, a lodging-house-keeper in *Birmingham*, died on the 7th of January, 1893, leaving his brother, *George Shaw*, his heir-at-law and one of his next of kin, who, believing that *Henry Shaw* had died intestate, applied for administration to his estate, which was granted to him on the 21st of February, 1893. On the 27th of February, 1893, an action was brought in the Probate Division against *George Shaw* by persons claiming to be interested under a will alleged to have been made by *Henry Shaw* in 1881, the object of the action being to have probate of this alleged will granted to one *Purser*, as executor, and the administration granted to *George Shaw* revoked. By this alleged will, which was of a very illiterate character, *Henry Shaw* specifically devised two freehold houses, and also bequeathed certain furniture and other personal estate of small value, but made no residuary gift. It appeared that the testator also died seised of a plot of freehold building land, but this was undisposed of by the will, and consequently passed to *George Shaw* as his heir-at-law. *George Shaw* was cited in the Probate action as heir-at-law, and, as Defendant, disputed the validity

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of the alleged will. The action was tried in October, 1893, before the President, who on the 30th of October gave judgment establishing the will, and revoking the administration granted to *George Shaw*. By that order the President, on the application of *George Shaw*, directed his costs to be paid "out of the estate," but no direction was given as to the Plaintiffs' costs. On the 5th of December, 1893, probate of the will was granted to *Purser*, and on the 23rd of December, 1893, this action was commenced by a Mrs. *Bridges*, one of the specific devisees, against *George Shaw* and the executor, *Purser*, claiming administration of the testator's real and personal estate.

The testator's personal estate being insufficient for the payment of the costs of the several parties to the Probate and administration actions, or of the costs and remuneration of a receiver who had been appointed in the Probate action, this summons was taken out in the administration action, by Mrs. *Bridges* against *George Shaw* and the mortgagee of his share in the testator's estate, and also against certain infants interested as specific devisees under the will, asking (among other relief) to have the costs of all parties in the Probate action and in the administration action paid out of the testator's real estate which had descended to *George Shaw*, in priority to the real estate specifically devised.

The main question was whether the Chancery Division had jurisdiction to order payment of the costs of the Probate action out of the real estate at all.

Marten, Q.C., and *Bardswell*, for the Plaintiffs :—

The costs of the Probate action, so far as they cannot be provided for out of the personal estate, ought to be borne by the descended real estate. The Court has jurisdiction to order payment of the costs of a Probate action out of real estate. In *Smith* v. *Hopkinson* (1), where the testatrix had by her will directed that her testamentary expenses should be paid out of real estate, and the personal estate was insufficient, the Court ordered payment of the costs of the Probate suit out of the real estate. Under the *Court of Probate Act*, 1857 (20 & 21 Vict. c. 77), ss. 61, 62, the

(1) 4 P. D. 84.

heir and persons interested in the real estate may be cited and bound by the probate, and the Court must therefore have full jurisdiction, as against the real as well as the personal estate, to deal with the costs of the litigation. In *In re Morgan* (1) Mr. Justice *Butt* did not hesitate to order payment of costs out of real estate, and the Court of Appeal did not say that was wrong, but evidently thought it open to argument. In *In re Price* (2) the executor's costs of a Probate action were directed to be paid in an administration action out of the proceeds of sale of residuary real estate, although the order made in the Probate action merely directed that the costs of all parties should be paid out of the testator's personal estate. In *Charter* v. *Charter* (3) and *Young* v. *Dendy* (4), which may be referred to as authorities against the existence of the jurisdiction, it does not appear that the heir-at-law was cited. It is difficult to see how the jurisdiction as to costs can be limited to personal estate in face of the provisions of the *Court of Probate Act*, 1857, empowering that Court to decide as to the validity of wills of real estate. In the present case the Court in the Probate action has ordered the payment of the costs of the Defendant *George Shaw* "out of the estate," and those words must extend to the real estate.

The costs of the Probate action are therefore, so far as the jurisdiction of the Court is concerned, on the same footing as the costs of the administration action, not only as regards the personal, but also as regards the real, estate. As to the incidence of the costs of administration as between descended and devised real estates there is, no doubt, some conflict of authority; but we submit that the general rule is that the costs come first out of the descended real estate so as to exonerate the specifically devised estate, and give full effect to the intention of the testator to benefit the specified objects of his bounty; and in support of that proposition we rely on *Scott* v. *Cumberland* (5) and *Gowan* v. *Broughton* (6) as authorities which are to be preferred to *Bagot* v. *Legge* (7) and *Maddison* v. *Pye* (8). *Scott* v.

(1) W. N. (1890) 125.
(2) 31 Ch. D. 485.
(3) 3 Ch. D. 218.
(4) Law Rep. 1 P. & M. 344.
(5) Law Rep. 18 Eq. 578.
(6) Ibid. 19 Eq. 77.
(7) 2 Dr. & Sm. 259.
(8) 32 Beav. 658.

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Cumberland (1) has never been overruled. See also *Morgan* and *Wurtzburg* on Costs (2).

[KEKEWICH, J., referred to *Trethewy* v. *Helyar* (3), and observed that the authorities shewed that the question was to be determined according to the particular circumstances in each case.]

No doubt the matter is one of discretion; but there is nothing in this case to take it out of the general rule.

Then, as to the costs of the executor, we submit that his priority is confined to the personal estate: *In re Pearce* (4); and it is clear that the costs of the Probate action must be postponed to the costs of the administration action: *Major* v. *Major* (5). We come to have both the real and personal estate administered, and we cannot have the real estate administered without the personal estate: *Rowsell* v. *Morris* (6). To administer the personal estate we were obliged to go to the Probate Division to obtain a legal personal representative. Why should not the costs of that necessary step be costs in the administration, and be borne by such part of the estate as the Court thinks proper, in the exercise of the large discretion it possesses under Order LXV., rule 1?

Warmington, Q.C., and *S. B. L. Druce*, for the Defendants, *George Shaw* and his mortgagee; and

Renshaw, Q.C., *Charles Browne*, and *J. Tanner*, for other Defendants, were not called upon.

KEKEWICH, J.:—

In this case there is a variety of real estate; that is to say, there is specifically devised real estate, and there is descended real estate. There is no residuary real estate, and there is a question to be dealt with hereafter as to how such costs as are payable out of the real estate are to be distributed as between the several classes of real estate. I will not consider that now. But before the will was proved there was an action in the

(1) Law Rep. 18 Eq. 578.
(2) Pages 166, 176.
(3) 4 Ch. D. 53.
(4) 35 W. R. 358; 56 L. T. (N.S.) 228; W. N. (1887) 51.
(5) 2 Drew. 281.
(6) Law Rep. 17 Eq. 20.

Probate Division in which the will was propounded, and, after the trial, the will was admitted to probate. The Defendant, *George Shaw*, was of course a party to that action. Nothing was said about the Plaintiffs' costs: the order dealt with the costs of the Defendant, and the Court directed his costs to be paid out of the estate, leaving the other costs to be provided for in due course of administration. I suppose that was because, if the Court had not done that, the unsuccessful party would not have been allowed his costs anywhere. I think it is clearly beyond dispute that the order means that the costs should be paid out of the personal estate.

The Court (it is not necessary for me to go back to ancient history) well knew that the Probate Court dealt with personal estate only, and that, in granting probate, the Probate Division had authority touching personal estate only. It is true that the probate of a will is useful as regards real estate. It has always been admitted by conveyancers as a document of title, and speaking generally it is treated as evidence of devise until challenged. But, except in certain instances, such as the appointment and remuneration of receivers, the Probate Division has no jurisdiction over real estate at all, and its orders do not affect real estate. It has been held by Lord *Penzance*, after consideration, in *Young* v. *Dendy* (1), that the Probate Court has no jurisdiction to direct payment of costs out of real estate. That decision has been cited and acted upon in several cases, and has never been questioned at all. Mr. *Bardswell* says that this is not in accordance with the ruling of the Court of Appeal in *In re Morgan* (2); but I cannot think that the Lords Justices intended to leave the question open. I have taken pains to inquire whether there has been any recent statute giving the Court of Probate any more extensive jurisdiction than it formerly possessed, and have ascertained that there has been nothing of the kind. The result is that, where the Probate Division orders costs to be paid out of "the estate," that means out of the estate over which it has jurisdiction, that is, the personal estate.

Then Mr. *Bardswell* says that in an administration action it is right to direct the costs of an action in the Probate Division to be

(1) Law Rep. 1 P. & M. 344. (2) W. N. (1890) 125.

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paid out of the estate generally, and that, where the personal estate is insufficient, as it is here, then those costs must be thrown on the real estate. I am not considering how they should be borne, if at all, by the real estate. I can conceive cases in which it would be right to direct the costs of contesting a will to come out of real estate, where the Chancery Division had full seisin of the matter, and where it considered that the executors, either with or without authority to act, on proper reflection thought that the costs should be paid. But it appears to me that this is a matter of discretion in every case, and that it would be wrong to lay down that, wherever a will was contested, the Court should order the costs of the contest to be paid out of the real estate. Here the personal estate is of very small amount, and the contest was in the Probate Division. I dare say the costs of that contest were greatly increased by the opposition of the Defendant as representing the real estate. I am not in a position now to say whether he incurred all those costs beneficially, or advisedly, or otherwise. I do not wish now to shut him out from an appeal; but I do hold that, except under such special circumstances as I have mentioned, the Court has no jurisdiction to make such an order as is now asked, and certainly not to order the costs of contesting the will in the Probate Division to be paid out of any part of the real estate.

Therefore, the costs of contesting the Probate action must be paid out of the personal estate.

There will be an inquiry as to the debts of the testator, and the rest of the summons must go back to Chambers.

Solicitors: *Letts Brothers,* agents for *P. Baker, Birmingham; Baker, Lees & Co.; Gamlen & Burdett,* agents for *Cottrell & Son, Birmingham.*

G. I. F. C.

FORTESCUE *v.* LOSTWITHIEL AND FOWEY RAILWAY COMPANY.

KEKEWICH, J.

1894

July 25.

[1893 F. 1348.]

Railway Company — Landowner — Conveyance — Covenant — Accommodation Works—Personal Services—Transfer of Undertaking to New Company—Liability of New Company—Specific Performance—Form of Judgment.

Where a railway company has, on the purchase of land for the purposes of their Act, and as part of the consideration, entered into covenants with the landowner to make and maintain certain accommodation works, and also to perform certain acts in the nature of personal service, and then, by a subsequent Act of Parliament, the company is dissolved and its undertaking transferred to another railway company "subject to the obligations and liabilities" of the old company, the landowner can maintain an action against the new company for specific performance of the whole of the covenants, including that for personal service.

Form of judgment against a railway company for specific performance of covenants.

THE Defendants, the *Lostwithiel and Fowey Railway Company*, were incorporated by the *Lostwithiel and Fowey Railway Act*, 1862, for the purpose of making a railway from the *Cornwall Railway* (afterwards amalgamated with the *Great Western Railway*) near *Lostwithiel* to *Fowey* in the county of *Cornwall*.

By a settlement of 1865 certain estates, including *Colvethick Wood*, and the lands taken as hereinafter mentioned, were limited to certain uses under which the Plaintiff was now tenant for life.

For the purposes of their railway the Defendants, the *Lostwithiel and Fowey Railway Company*, some years before the conveyance next mentioned, took possession of certain lands comprised in the said settlement, and situate in the county of *Cornwall*, including part of *Colvethick Wood*.

By a deed of conveyance engrossed in June, 1873, but dated the 31st of December, 1873, and made between the Plaintiff's predecessors in title under the settlement of the one part, and the Defendants, the *Lostwithiel and Fowey Railway Company*, of the other part, the lands so taken were conveyed to the company, who had already, some years before the conveyance, constructed

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their railway on the lands, and also certain accommodation works mentioned in the conveyance. The railway ran between the said lands and wood on the one side, and the River *Fowey* on the other, and cut off the access from the lands and wood to the river. Accordingly, as part of the consideration for the sale and conveyance of the lands, the company covenanted with the grantors, and all other persons claiming under the settlement of 1865, as follows (amongst other things): That the company would, at their own expense, before the 29th of September, 1873, for the exclusive use of the covenantees, make and afterwards maintain, on the west side of the railway and by the side of the railway, a convenient road of twelve feet in width at the least, in the direction shewn on the plan drawn on the conveyance, and properly fence and keep fenced the same throughout; and that the company would, at such expense and for such use as aforesaid, before the 29th of September, 1873, make and afterwards maintain on the river side of the railway, and on a level with and adjoining it, a good and substantial wharf or depôt of certain dimensions by the side of the railway, for the reception and storing of timber poles, faggot wood, and other produce of *Colvethick Wood*; and would also before the said day make and maintain, as shewn on the said plan, an approach road not less than ten feet in width from the foreshore of the river to the said wharf or depôt; also two level crossings over the railway from the said wharf or depôt, and from another wharf or depôt therein mentioned, to the said road on the west side of the railway, at the points shewn on the said plan: "And further that the said railway company, their successors and assigns, shall and will at all times, on receiving twenty-four hours' previous notice, take and safely convey all timber poles and faggot-wood and other produce of the said *Colvethick Wood* from the said road on the west side of the railway, or from such other place at the foot of the said wood by the side of the said railway where the same respectively may be lying or stored, across the railway and deposit the same where required on the said wharves or depôts, or on either of them, free of all expense to the said covenantees."

Subsequently, under the *Lostwithiel and Fowey Railway Act*,

1892, the company's undertaking became vested in the Defendants, the *Cornwall Minerals Railway Company*.

Sect. 6 of that Act enacted that, on the issue to the *Fowey Company* of certain stock of the *Minerals Company*, and the payment of the sums of money thereinafter stipulated to be paid by the *Minerals Company*, as the consideration of the transfer to them of the *Fowey Company's* undertaking (defined in a previous section as including the whole of the works, lands, and other property of the latter company—other than money and securities for money—and all its powers, authorities, exemptions, rights, and interests vested in that company), "the said undertaking, subject to the contracts, obligations, debts, and liabilities of the *Fowey Company* affecting the same, shall be and the same is by virtue of this Act transferred to and vested in the *Minerals Company* as an integral part of their undertaking, and shall henceforth become and continue to be part of the undertaking of the *Minerals Company*."

Sect. 8 contained a power (which was afterwards exercised) for the *Minerals Company* to retain a sum of stock to secure them against any claim in respect of debts of the *Fowey Company* affecting their undertaking which might be outstanding and unsatisfied at the time fixed for the issue of the stock and the said payments.

Sect. 14 enacted that, as soon as conveniently might be after the transfer, the *Fowey Company* should proceed to wind up their affairs, and that, "so soon as their affairs shall have been wound up, the company shall by virtue of this Act be dissolved and cease to exist."

Sect. 15 enacted that, with a view to the winding up and dissolution of the *Fowey Company*, the directors of that company should issue advertisements requiring all persons having any claim against that company (except any debenture, charge, or lien affecting that company or their undertaking) to send in particulars of their claims; and that the directors of the *Fowey Company* should, as soon as might be after the publication of such advertisements, discharge all debts and liabilities properly owing by that company the particulars of which should have been sent in as aforesaid, or which were otherwise known to such directors; and that "all claims and demands whatsoever of which

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the *Fowey Company* shall not have received notice in writing within three months from the date of the last insertion of such advertisements, and which are not otherwise known to them, shall be barred against all parties, and the rights of all persons therein or thereunder shall absolutely cease and determine."

Notwithstanding the construction of the railway, it had never been worked or opened for traffic. Some of the accommodation works constructed before the date of the conveyance had not been maintained; and others covenanted to be made—in particular the two roads of twelve feet and ten feet wide, and the level crossings—had not been made at all, they having been, it was said, allowed by the Plaintiff—who was the present tenant for life under the settlement of 1865—to remain unmade without objection.

The Plaintiff, alleging that he was suffering damage from the Defendants' default, brought this action against both the *Fowey Company* and the *Minerals Company*, claiming specific performance of the covenants and obligations in the conveyance of 1873; also a declaration that the Defendants were liable to make the level crossings mentioned in the conveyance, and to convey and deposit, as therein mentioned, the timber poles, faggot wood, and other produce of *Colvethick Wood*.

The *Fowey Company*, in their defence, maintained that they had duly complied with the requirements of sect. 15 of the Act of 1892; that the three months had expired before the commencement of the action or any notice of the Plaintiff's claim; and that in fact, until shortly before the commencement of the action, they had no notice or knowledge of such claim; and they relied on the delay and laches of the Plaintiff.

The *Minerals Company*, in their defence, admitted they were now in possession of the lands comprised in the conveyance of 1873, and that some of the accommodation works had not been made. They also alleged that the works covenanted to be made, other than those that had already been made before the date of the conveyance, were allowed by the Plaintiff and his predecessors in title to remain unmade without objection, and that they, the *Minerals Company*, had no notice of any claim in respect of such works until after the passing of the Act of 1892;

and they contended that the covenants had been waived, or, alternatively, that the Plaintiff was barred by the laches and acquiescence of himself and his predecessors from any claim for specific performance of the covenants; that, if and so far as there was any existing liability under the covenants, it was a liability in damages only; and that in any case, if either of the Defendants were liable to the Plaintiff under the Act of 1892 and conveyance, or otherwise, it was the *Fowey Company* alone.

They also claimed the benefit of the *Statute of Limitations*; and they further contended that the covenants for the conveyance and deposit of the produce of *Colvethick Wood* was a covenant for the performance of services, and ought not to be ordered to be specifically performed.

They also raised the question whether the works covenanted to be made were accommodation works at all, or whether they were authorized by the *Fowey Company's* powers. They further denied that the Plaintiff was suffering any damage.

The Plaintiff having joined issue, the action now came on for trial.

Renshaw, Q.C., and *Medd*, for the Plaintiff:—

The first question is whether the obligations of the *Fowey Company* under the conveyance of 1873 have been transferred to the *Minerals Company* by the Act of 1892, so as to render the latter company directly liable to the Plaintiff. We submit that sect. 6 of that Act has that effect, and that the covenants entered into by the *Fowey Company* must now be performed by the *Minerals Company*. This point is really covered by *Earl of Jersey* v. *Great Western Railway Company* (1). It is impossible to say

(1) C. A. July 11, 1893.

EARL OF JERSEY *v.* GREAT WESTERN RAILWAY COMPANY.

[1892 J. 485.]

BY an agreement made the 5th of April, 1851, between *George*, fifth Earl of *Jersey*, of the one part, and the *Briton Ferry Floating Dock Company* (a company registered under the *Joint Stock Companies Act*) of the other part, the company agreed to purchase for the purpose of making docks with a branch railway to the *South Wales Railway*, and at and subject to the rent-charge and royalties therein mentioned, a piece of mud land near *Baglan Bay*, *Glamorganshire*, shewn on the annexed plan, and forming part of the *Briton Ferry* estate of which the Earl was seised in fee.

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that the original contract is not now binding, for possession has been taken under it.

Clause 8 of the agreement provided "that the company shall make and for ever maintain a public road of fifty feet wide from the land of the said Earl on the north-east side of the dock to the said Earl's land on the south-west side thereof in the direction coloured purple on the said plan." Clause 18 provided that the Earl and the said company respectively should use their best endeavours to obtain the insertion of a clause in a then proposed Act of Parliament empowering the company to carry that contract into effect. By that proposed Act, which received the royal assent on the 3rd of July, 1851, under the title of the *Briton Ferry Dock and Railway Act*, 1851 (14 & 15 Vict. c. xlix.)—of which the *Companies Clauses Act*, 1845, the *Lands Clauses Consolidation Act*, 1845, the *Railways Clauses Consolidation Act*, 1845, and the *Harbours, Docks and Piers Clauses Act*, 1847, were declared to form part—the *Briton Ferry Floating Dock Company* was incorporated for the purpose of making and maintaining docks at *Baglan Bay* with a branch railway to the *South Wales Railway*, with power to purchase and hold lands for the purposes of their undertaking. Sect. 27 enacted that, subject to that and the incorporated Acts, and to the agreement of the 5th of April, 1851, it should be lawful for the company to make and maintain the said dock, railway, and works specified in the Act.

The company entered into possession of the piece of land comprised in the agreement before the passing of the Act, and remained in possession thereof and constructed docks thereon, but never made the road mentioned in the agreement.

The Earl died in 1859, and shortly afterwards, in the same year, his grandson, the Plaintiff, became owner in fee of the *Briton Ferry* estate, including the piece of land contracted to be sold to the company. In 1867 the Plaintiff, and other persons interested under the agreement of 1851, commenced an action against the company for specific performance of that agreement, and on the 1st of March, 1869, a decree was made for specific performance accordingly.

By an indenture made the 15th of October, 1872, between the Plaintiff and other persons interested in the *Briton Ferry* estate on the one hand, and the dock company on the other, after reciting that it was agreed between the parties that the public road mentioned in clause 8 of the agreement of 1851 should be of the width of thirty-five feet only, instead of fifty feet, and should be in the direction shewn on the plan annexed to the present indenture; and that the dock company had required a conveyance of the land agreed to be sold to them under the said agreement; and after reciting the decree of 1869; the piece of mud land mentioned in the agreement of 1851 was conveyed to the dock company, subject to the rents and royalties therein mentioned, reserving to the Plaintiff and other the owners for the time being of the *Briton Ferry* estate, and his and their tenants, &c. a right of way over the road of thirty-five feet wide thereinafter covenanted to be made by the company as shewn on the said plan, and for the more convenient user thereof to lay and maintain and use any tram or railway upon the whole or any part of such

The next question is, whether performance of the obligations of the covenants, both as to the accommodation works and the

road with all necessary and proper works, but so that such user should be subject to the by-laws and regulations of the company, so far as the same affected the working of the railway. And the company thereby for themselves, their successors and assigns, covenanted with the Plaintiff, his heirs and assigns, that they, the company, their successors and assigns, would, at their own expense, make and maintain a public road of thirty-five feet wide from the land of the Plaintiff on the north-east side of the company's works to the lands of the Plaintiff on the south-west side thereof, as shewn on the said plan.

On the 28th of July, 1873, the *Briton Ferry Dock (Transfer) Act*, 1873, received the royal assent. The Act recited the *Briton Ferry Dock and Railway Act*, 1851, and that "the powers of the *Briton Ferry Dock Company* under the Act of 1851 were thereby expressly granted subject to an agreement mentioned in the 27th section of the Act between the Earl of *Jersey* and the *Briton Ferry Company*, by which agreement (amongst other things) the said Earl sold to the *Briton Ferry Company* certain lands" for the purposes of their works. It also recited that the above-mentioned action for specific performance had been commenced, but did not refer to the decree: also that the dock company were wholly insolvent and unable to meet their engagements and liabilities, and that it was expedient that the undertaking of the dock company should be transferred and vested in the Defendants, the *Great Western Company*, upon and subject to the terms and conditions in the present Act appearing. Sect. 2 then enacted as follows: "From and after the passing of this Act the *Briton Ferry Company* (meaning thereby, and when elsewhere used in the Act, the *Briton Ferry Floating Dock Company*) shall be dissolved, and the dock, railway, works, property and undertaking of the *Briton Ferry Company* (in this Act called 'the vested property') are by this Act vested in the *Great Western Company* as part of their undertaking, subject nevertheless to the payment by the *Great Western Company* to the Right Honourable *Victor Albert George Villiers*, Earl of *Jersey* (hereinafter called 'the said Earl'), or other the person or persons for the time being entitled thereto, as from the 1st day of July, 1873, of all the rent-charges and royalties reserved in and by a conveyance from the said Earl and others to the *Briton Ferry Company*, dated the 15th of October, 1872, and also subject to the payment by the *Great Western Company* of the several moneys hereinafter mentioned and hereby provided to be paid by that company (which last-mentioned moneys shall become debts due and recoverable at law, and shall be paid by the *Great Western Company* to the persons and at the times and in the manner hereinafter respectively mentioned), and also subject to all the obligations and liabilities of the *Briton Ferry Company* under the recited Acts, or any of them, with respect to the maintenance, repair, management, regulation, working and user of the vested property or any part thereof, and the traffic at or on the dock and railway of that company, but freed and by this Act absolutely discharged from all other debts, liabilities, and

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personal services, can be specifically enforced. It is said that it is not the rule of the Court to grant specific performance of

engagements of that company, whether directly affecting the vested property or affecting the *Briton Ferry Company* in respect of the same."

Sect. 3: "Upon the vesting in the *Great Western Company* of the vested property, all the rights, powers, privileges and authorities of the *Briton Ferry Company*, and their directors, officers or servants, which by virtue of any of the Acts relating to that company might be exercised and enjoyed by them respectively with respect to the premises agreed to be sold, shall be exercised and enjoyed by the *Great Western Company* under and with the same regulations, restrictions, obligations, penalties and immunities, in accordance with those Acts, as by the *Briton Ferry Company* and their directors, officers and servants."

Sect. 4: "Notwithstanding the vesting, and except only as is by this Act otherwise provided, everything before the vesting done, suffered, and confirmed, respectively under or by virtue of the Acts relating to the *Briton Ferry Company*, and every right by any of those Acts saved, shall be as valid as if the vesting had not happened, and the vesting and the operation of this Act respectively shall accordingly be subject and without prejudice to everything so done, suffered, and confirmed, and all rights so saved respectively, and to all rights, liabilities, claims and demands, both present and future, which, if the vesting had not happened, would be incident to or consequent on everything so done, suffered, and confirmed, and all rights so saved respectively; and with respect to everything so done, suffered, and confirmed, and all rights so saved respectively, and all such rights, liabilities, claims and demands (but subject to the provisions of this Act), the *Great Western Company* shall, to all intents and purposes, represent the company: Provided that the generality of this provision shall not be restricted by any of the other sections and provisions of this Act."

Sect. 5: "The terms and conditions upon and subject to which the vested property is by this Act vested in the *Great Western Company* are as follows": then came a long series of payments to be made by that company to the said Earl, including a rent-charge and royalties, but without any reference to the road, and also including payments to creditors of the *Briton Ferry Company*. Neither the road mentioned in clause 8 of the agreement of 1851, nor that mentioned in the deed of 1872, was ever made; but after 1872 negotiations were continually taking place between the Plaintiff and the Defendants, the *Great Western Railway Company*, with reference to the construction of the road mentioned in the deed of 1872. These negotiations continued down to 1890, but then fell through owing to the Defendant company refusing to admit the Plaintiff's right to lay a double line of tramway on the road when constructed. Ultimately, in 1892, the Plaintiff brought the present action against the Defendant company, claiming a declaration that the covenant by the *Briton Ferry Company* contained in the deed of 1872 to make and maintain a public road thirty-five feet wide, as indicated on the plan to the deed, ought to be specifically performed, and that specific performance might be decreed accordingly: also a declaration that the

covenants of this nature, because it cannot take upon itself to see that the works and acts are done. That is no doubt the

Plaintiff, his heirs and assigns, and other the owners or owner for the time being of the *Briton Ferry* estate, and his and their tenants, &c., were entitled to a right of way over the road so to be made, and to lay and maintain thereon and use a tram or railroad thereon either with double or single lines of rail. In the alternative the Plaintiff claimed specific performance of clause 8 of the agreement of 1851.

In their statement of defence the Defendant company contended that the agreement of 1851 and the covenant in the deed of 1872 never were binding on them; and that, even if they ever were so binding, all right of the Plaintiff to specific performance thereof was excluded by lapse of time, and on the following grounds, viz., that the 8th clause of the agreement of 1851, if it ever was binding on the *Briton Ferry Company*, had been merged in, superseded and extinguished by the covenant in the deed of 1872; that the Plaintiff had not hitherto alleged claim to the road in question under the agreement of 1851; that the liability, if any, of the *Briton Ferry Company* under clause 8 of the agreement of 1851 and the covenant of 1872, was under no Act of Parliament whatever, and, in particular, was not (within the meaning of the Act of 1873) one of the "obligations and liabilities of the *Briton Ferry Company* under the recited Acts, or any of them, with respect to the maintenance, repair, management, regulation, working and user of the vested property, or any part thereof, and the traffic at or on the dock or railway of that company"; that, on the contrary, the liability (if any) of the *Briton Ferry Company* under clause 8 of the agreement of 1851, or under the covenant of 1872, and the burden of the easement claimed by the Plaintiff, were among the "other debts, liabilities and engagements of that company, whether directly affecting the vested property or affecting the *Briton Ferry Company* in respect of the same," which the express terms of the Act of 1873 prevented from ever attaching to the Defendants; that such easement had never been claimed and never existed as a right independent of the making of the road, and had in fact never been exercised, and was conditional on the said road being made, and that right (if any) thereto ceased as against the Defendants by their discharge under such Act from the said "other debts, liabilities, and engagements"; also that the Plaintiff and his predecessors had by acquiescence abandoned any right which they might have had against the Defendants. The Defendants further denied that any obligation of the *Briton Ferry Company* under the covenant of 1872, or under the agreement of 1851, ever became vested in them, the Defendants, or that the covenant ever became enforceable against them. They also pleaded the *Statutes of Limitations* and the *Statute of Frauds*.

Issue having been joined, the action came on for trial before Mr. Justice *Stirling*, who, on the 22nd of April, 1893, gave judgment for the Plaintiff, with a declaration that the Defendants were bound by the covenant of the *Briton Ferry Company* in the deed of 1872 as to making the road, and also a declaration, in the terms of the deed, as to the Plaintiff's right of

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general rule; but there is an exception to it where a railway company has taken lands from a landowner upon the terms that user of the road and of laying, &c., thereon a tram or railway, such last-mentioned right not being confined to a single line of tram or railway: the Defendants to pay the costs of the action.

The Defendants appealed.

The appeal was heard on the 11th of July, 1893.

Sir *H. Davey*, Q.C., *Buckley*, Q.C., *Cripps*, Q.C., and *Medd*, for the Defendants, cited *Haywood* v. *Brunswick Permanent Benefit Building Society* (8 Q. B. D. 403); *Austerberry* v. *Corporation of Oldham* (29 Ch. D. 750); *Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company* (Law Rep. 2 H. L., Sc. 347); *Halesowen Railway Company* v. *Great Western Railway Company* (4 Nev. & Mac. 224; 52 L. J. (Q. B.) 473); and *Reg.* v. *Midland Railway Company* (19 Q. B. D. 540).

Hastings, Q.C., and *Howard Wright*, for the Plaintiff, were not called upon.

LINDLEY, L.J.:—

Mr. *Graham Hastings*, I do not think we need trouble you.

I think the argument addressed to us is far too subtle for any practical purpose. The real question is, What is the true interpretation of sects. 2, 3, and 4 of the *Briton Ferry Dock (Transfer) Act*, 1873? In order to understand those sections it is not only necessary to read them, but it is necessary to understand the state of things which existed at the time the Act of Parliament passed. I will refer very shortly to that state of things before I comment upon the language of the particular sections. [His Lordship then read the agreement of 1851, and the material sections of the *Briton Ferry Dock and Railway Act*, 1851, including sect. 27. His Lordship continued:—]

Now, what is the effect of that 27th section of this Act of 1851? I agree that it does not make the agreement there referred to an agreement binding upon this company in this sense—that before anything was done under the powers conferred by this Act of Parliament, the *Briton Ferry Dock Company* could be sued upon that agreement. I do not think it could. But it imposed upon the *Briton Ferry Company* the obligation to do that which was provided by the agreement, unless the agreement was modified by the parties to it. It imposed upon the *Briton Ferry Company* that obligation as soon as the *Briton Ferry Company* acted upon the powers conferred by the Act of 1851; in other words, it was impossible, after the Act of 1851, for the *Briton Ferry Company* to take any advantage of sect. 27, except upon the terms imposed by statute of complying with the agreement referred to, subject of course to any modification which the company might make and the parties agree to. That was a statutory obligation imposed, under the circumstances to which I have alluded, by the 27th section of this Act of 1851.

After that there was litigation between Lord *Jersey* and the *Briton Ferry Company*; there was a suit for specific performance of the agreement to which I have referred, and there was a decree; and on the 15th of October, 1872, there was a conveyance by the Earl of *Jersey* of the

they will carry out certain works: *Ryan* v. *Mutual Tontine Westminster Chambers Association* (1); *Greene* v. *West Cheshire*

lands mentioned in the particular deed, and there was a covenant by the company to make, not a road of fifty feet wide, but a road of thirty-five feet wide, and there was some addition about a tram, to which I will refer by-and-bye. Now, what was that? Was that a performance of the statutory obligation imposed by sect. 27? Certainly it was no such thing. The statutory obligation was to make and maintain the road. That deed was only a step towards the performance of that obligation. As a matter of pleadings and of suing, I suppose the Plaintiff would have had to sue the company on the deed, and not upon the agreement; but when we are asked to say that the effect of that deed was to extinguish all the statutory obligations imposed by sect. 27, the answer is, the obligations subsist, they are not performed, the road is not made, and the road is not only to be made, but to be perpetually kept up. How is the deed a performance of the statutory obligation? It is nothing of the sort. Therefore the obligation imposed by sect. 27 of the Act of 1851 remains, modified, I agree, by a subsequent agreement between the parties to the recited agreement, and which parties were competent to modify its terms.

That is the state of things when we come to the Act of 1873, which vests the *Briton Ferry Company* in the *Great Western Railway Company*. [His Lordship then read the recitals in that Act, and also sect. 2, laying particular stress on the words "subject to all the obligations and liabilities of the *Briton Ferry Company* under the recited Acts, or any of them, with respect to the maintenance, repair, management, regulation, working and user of the vested property or any part thereof, and the traffic at or on the dock and railway of that company," and then proceeded:—]

Now I pause there for a moment, and ask whether the statutory obligation to which I have referred is not an obligation and a liability of the *Briton Ferry Company*, "under the recited Acts, or any of them," with respect to the user of the vested property. I answer that question unhesitatingly by saying that it is; and it is really a mere play upon words to say that it is not. The argument is, that it is not an obligation under the Act at all, but an obligation under the deed to which I have referred. Well, I think that is adhering to words, and missing the intention which underlies the use of the words themselves. I cannot adopt that construction. It seems to me to miss the whole thing. This portion of sect. 2 imposes upon the *Great Western Railway Company* an obligation of making the road pursuant to sect. 27 of the Act of 1851, but of course varied by the parties to the agreement which is therein recited. If that is right, we need not trouble ourselves much about the rest of sect. 2. Under that section, it appears to me that the obligation of the *Great Western Railway Company* to make this road is clear and plain.

Supposing there is any doubt about it; supposing that the obligation is not annexed to the dock, railway,

(1) [1893] 1 Ch. 116, 128.

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Railway Company (1), the judgment in which is given in *Seton* on Decrees (2); *Fry* on Specific Performance (3); *Todd* v. *Midland Great Western Railway of Ireland* (4).

works, property, and undertaking, but is annexed to the "rights, powers, privileges and authorities" which are referred to in sect. 3, then sect. 3, in my opinion, preserves the same obligation. Sect. 3 runs thus: "Upon the vesting in the *Great Western Company* of the vested property, all the rights, powers, privileges and authorities of the *Briton Ferry Company*, and their directors, officers, or servants, which by virtue of any of the Acts relating to that company might be exercised and enjoyed by them respectively with respect to the premises agreed to be sold, shall be exercised and enjoyed by the *Great Western Company*." Now, how? "Under and with the same regulations, restrictions, obligations, penalties and immunities, in accordance with those Acts, as by the *Briton Ferry Company*, and their directors, officers and servants." Under those words this liability, which is, from the point of view I am now suggesting, annexed, not to the property, but to the rights, powers, privileges and authorities, is clearly imposed on the *Great Western Railway Company*. Then it is said in answer to that: "No, it is not, because, if you get it under sect. 3, it is excluded by the latter part of sect. 2." I cannot read sect. 2 as applying to sect. 3 at all. If we are to draw a distinction, the latter part of sect. 2 relates to property, and not to rights, powers, privileges and authorities. Then when you come to sect. 5, which, it is very true, begins with this affirmative language —"The terms and conditions upon and subject to which the vested property is by this Act vested in the *Great Western Company* are as follows"—we have a long string of payments, and there is no reference to this road, nor is there any reference to that which has gone before. Sect. 5 is not an enumeration of all the terms and conditions on which this property is vested, and that construction would be utterly inconsistent with sects. 2, 3, and 4. These are additional terms —terms got out of the agreement which immediately preceded the passing of this Act.

I must say that, notwithstanding the extremely ingenious arguments that we have heard, I think they are reduced to a mere play upon words which, to my mind, defeats the plain and obvious intention of this Act of Parliament. I think the appeal ought to be dismissed with costs.

LOPES, L.J.:—

I think if anything could possibly prevent one understanding and arriving at the proper conclusion in this case, it would be the highly ingenious argument which has been addressed to us; but it appears to me that the case is a clear one, and may be put simply upon sect. 27 of the Act of 1851, and sect. 2 of the Act of 1873.

Now, first with regard to sect. 27 of the first Act, the Act of 1851, I do not propose to read it again, because

(1) Law Rep. 13 Eq. 44.
(2) 5th Ed. vol. iii. pp. 1894–5.
(3) 3rd Ed. p. 46, pl. 103.
(4) 9 L. R. Ir. 85.

Warmington, Q.C., and *Macnaghten*, for the Defendants, the *Fowey Company*:—

First, all our liabilities of every kind have been transferred by the Act of 1892 to the *Minerals Company*; and, secondly, it has been already read; but according to my view, if the *Briton Ferry Dock Company* took the benefit of the powers conferred upon them by that Act, there was created with regard to them a statutory obligation to make the road in question—an obligation which no doubt might be, as it was, modified subsequently by agreement between the parties. Therefore, according to my view, sect. 27 creates a statutory obligation upon the dock company to make this road.

Then I turn to the Act of 1873. I find that Act recites many things, and amongst others it recites the Act of 1851; and then it has a recital to this effect: "And whereas the powers of the *Briton Ferry Dock Company* under the Act of 1851 were thereby expressly granted subject to an agreement mentioned in the 27th section of the Act"—the section with which I have been dealing—"between the Earl of *Jersey* and the *Briton Ferry Company*, by which agreement (amongst other things) the said Earl sold to the *Briton Ferry Company* certain lands," and so on. I read that because it is material, I think, when we come to deal with sect. 2. Then sect. 2 of the Act transfers the *Briton Ferry Company* to the *Great Western Railway Company*, but transfers it subject to certain things—subject to certain payments with which it is unnecessary to deal; and then come these important words: "And also subject to all the obligations and liabilities of the *Briton Ferry Company* under the recited Acts, or any of them, with respect to the maintenance, repair, management, regulation, working and user of the vested property, or any part thereof." Now, as I have already said, we have the statutory obligation under sect. 27; we have the Act which contains that section recited in this one; and then we have the words, "under the recited Acts." It appears to me that that is an obligation under the recited Acts, and an obligation which is binding on the *Great Western Railway Company*.

There is only one other remark I would make, and that is this. There was a question raised, I think, with regard to whether or not there might be more than one line of rails. The words used are "any tram or railway." I entirely adopt the view of the learned Judge below. I do not think, when you talk of a railway or a tram, that in using that term you intend to confine it to any single line of rails. I think that "any tram or railway" has a more comprehensive meaning than that, and would permit more than one line of rails to be placed upon it.

I entirely agree with the judgment of the learned Judge below, and think that this appeal ought to be dismissed with costs.

A. L. SMITH, L.J.:—

I am of the same opinion, and I agree with what has fallen from my Brother as regards the ability and ingenuity of the arguments which have been addressed to us; but I think, when this case is grasped, it is tolerably plain, if not absolutely clear. In 1851

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even if that were not so, the Plaintiff can maintain no claim against us, as he has not given us the required notice of it under sect. 15 of that Act.

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the then Earl of *Jersey* sold some land to the *Briton Ferry Company*, a company which was incorporated under the *Joint Stock Companies Act*, and in the agreement under which he sold this piece of land to this company he stipulated that this company were to make him a road so as to join his lands which were to be severed by the proposed dock—land which was lying on the north-east side which would be severed from that on the south-west; and that was agreed to by the then company. In the same year, namely, on the 3rd of July, 1851, this company was incorporated under Act of Parliament, and by the 27th section of that Act it was enacted—stating it shortly—that the company then incorporated were empowered, if they wished—only if they wished—to make the dock, but if they made the dock they were to make the road, as stipulated by the agreement of the 5th of April in that same year. That is how I read sect. 27 of this Act. I do not read it through, for it has been sufficiently read and discussed, but that is what I hold to be the true meaning of that section. If this company chose to make this dock, then they were to make a road fifty feet wide, unless Lord *Jersey* thought afterwards he did not want a road fifty feet wide.

That is the state of circumstances on the 3rd of July, 1851. Now I ask, is that or is that not a statutory obligation which this company was placed under by this Act of the 3rd of July? I can only answer it in one way: certainly it was. What was imposed as an obligation on the company? The agreement did not impose the obligation on the company incorporated by the Act, because the agreement was not made with that company. But when the Act was passed, then it was that by virtue of the powers and provisions of that Act this obligation was imposed upon them: "If you think fit to make that dock for which you have taken power under this Act, then you are to make a road in pursuance of that agreement." Nothing can be clearer to me than that that was the position of matters at this date, and that it is a statutory obligation upon this company, assuming that this company thought fit to make a dock for which they had taken powers.

Now it was said that this agreement of the 5th of April was not incorporated into the Act or put into the schedule of the Act, and two or three cases were cited, one of which I took part in. The point in that case, and the only point we had to decide was, whether or not a difference which arose upon an agreement which was not incorporated in an Act of Parliament, or put in the schedule of an Act of Parliament, but which was only made binding by reason of a section in the Act which said that the agreement between the parties should be binding, was a difference between two railway companies under the provisions of any general or special Act so as to have that disagreement referred to the Railway Commissioners, and in that case we held that it was not.

There was a case also cited of *Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company* (Law Rep. 2 H. L., Sc.

Cripps, Q.C., and *Wace*, for the Defendants, the *Minerals Company*:—

The effect of sects. 6, 14, and 15 of the Act of 1892 is, that the *Fowey Company* remains liable for their contracts until its

347), which was antecedent to the case I allude to, where Lord *Cairns* held the same thing, and which in reality we followed in that case; and there has been a case since, before Mr. Justice *Stephen* and Mr. Justice *Wills*, in which they held the same thing. I wish only to point out that these three cases have nothing to do with the point we have to decide to-day, which is, whether or not by the Act of the 3rd of July, 1851, an obligation was placed upon the *Briton Ferry Company* with respect to the user of what in the subsequent Act is called "the vested property."

Then, the Act of 1851 being passed, the *Briton Ferry Company* do nothing. They do not perform the agreement. They make some of their dock, as I understand, but they do not carry out their agreement; whereon the present Earl of *Jersey* took proceedings in the Court of Chancery to compel them to carry out the agreement, and he got a decree in his favour on the 1st of March, 1869. On the 15th of October, 1872, a conveyance was executed between the Earl of *Jersey* and the *Briton Ferry Company* whereby the land was conveyed to the *Briton Ferry Company*, and, what was more, the Earl of *Jersey*, as it seems to me, gave up his right to the fifty-feet road, but adhered to his having a thirty-five feet road where a fifty-feet road should have been, and then the *Briton Ferry Company* covenanted to make that thirty-five feet road. I pause here for a moment. It was strongly argued that this indenture of the 15th of October, 1872, did away with in some way the obligation which, as I hold, the *Briton Ferry Company* were under by the Act of the 3rd of July, 1851. In my judgment that is untenable; it is not correct. All that the conveyance did was to shew the means by which the statutory obligation which the company were under could be carried out, since the Earl of *Jersey* did not insist on the whole fifty-feet road, but was willing to accept a thirty-five feet road.

Then came the Act of 1873, sect. 2 of which provided that after the passing of the Act the *Briton Ferry Company* were to go off the scene and the *Great Western Railway Company* were to stand in their shoes, but that the property—that is, the dock, railway, works, and property of the *Briton Ferry Company*—were only to vest in the *Great Western Railway Company* subject to three things subject to the payment of the rent-charge and royalties to the Earl after the passing of the Act; to the payment of other creditors, who are set forth more fully in sect. 5; and then to all the obligations "under the recited Acts, or any of them"—that is including the recited Act of 1851—with respect to the user of the vested property, or any part thereof. It seems to me that an obligation to make a road over part of this vested property fulfils every word in sect. 2, and, therefore, that this case falls within that section; and upon that ground this appeal should be dismissed.

If anything else were wanted, I think —and in this I agree with what was

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dissolution, which can only take place when their affairs have been wound up. Moreover, the accommodation works in question have been allowed to fall into abeyance by the Plaintiff himself and his predecessors, and it is now too late for the Plaintiff to claim their execution. As to the personal services, it is impossible for the Court to order their performance.

KEKEWICH, J.:—

To prevent any misconception, let me begin my judgment by saying that I do not intend to prejudice any question—if question there be—between the two railway companies respecting the obligations of one to the other. If the *Fowey Company* has failed to perform those duties which, as between them and the *Minerals Company*, they ought to have performed, then they must fight that out in some other proceedings; and if that results in costs, either in this or any other action, those costs will have to be settled in accounts between the two companies. I do not wish to prejudice any question of that kind.

The real question I have to consider is this: Assuming this covenant to be still an existing obligation, by whom ought it to be performed in the first instance, that is to say, performed for the benefit of the Plaintiff? There is certainly a great convenience in holding that, when the undertaking of a railway is transferred from the original company to another company subject to the contracts, obligations, debts and liabilities of the

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said by my Brother *Stirling*—that the Defendants would have equal if not as great difficulty in getting out of sect. 3; but I am quite willing to rest my judgment on sect. 2.

As regards trams, I think we are all of opinion that the tram or the railway to be laid down need not be a single tram, but may be a double tram or a double railway; but it must be subject to the by-laws of the *Great Western Company*.

LINDLEY, L.J.:—

I forgot to allude in my judgment to that tram. I quite agree that it is not to be confined to a single line. The judgment of the Court below must be varied by inserting these words: "but so that such user shall be subject to the by-laws and regulations of the Defendant company so far as the same affect the working of their railway."

We dismiss the appeal with costs.

Solicitors: *Freshfields & Williams; R. R. Nelson.*

G. I. F. C.

original company, that is equivalent to imposing on the transferee company those contracts, obligations, debts and liabilities, so that the transferee company may be sued directly. And the case which has been cited to me—*Earl of Jersey* v. *Great Western Railway Company* (1)—fully justifies me in saying that what is apparently good sense is also good law; and having the *Briton Ferry Dock (Transfer) Act*, 1873, on which that case proceeded, before me, concurring as it does in its terms with the *Lostwithiel and Fowey Railway Act*, 1892, it seems to me that there is at least as strong ground for that conclusion here as there was there. I will only mention one set of facts which is substantially common to the two cases. The transferring company is ultimately to be dissolved: it is not only to cease to exist as a going concern, but it is to cease to exist altogether—the corporation is to come to an end. It cannot be that the Legislature contemplated actions being brought against the corporation which has ceased to exist; nor can it be assumed that the Legislature intended that persons with whom solemn covenants have been entered into by the original company should have no remedy whatever by action; and yet, unless an action can be brought against the transferee company, that result would seem to follow. I hold, therefore, that the true meaning of the 6th section of this Act of 1892 is that the transferee company—that is to say, the *Minerals Company*—take the undertaking, and with it the obligation to perform the contracts, obligations, debts and liabilities of the *Fowey Company*, not only by way of indemnity to that company, but so that the *Minerals Company* are liable directly to the persons with whom those contracts have been entered into, in whose favour those obligations have been contracted, and to whom those debts and liabilities are due.

If that is the right construction, then the only other question is, Is this a continuing liability, and can it be ordered to be specifically performed? Now, as regards the nature of the liability, I have it in the conveyance of the 31st of December, 1873. It is a document of a familiar character, providing that the railway company, in consideration of the conveyance to

(1) *Ante*, p. 625, n.

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them of the land, shall make and construct, and afterwards maintain, certain accommodation works. These accommodation works are not now in existence. Some of them had been constructed before the conveyance; some of them which had been so constructed have not been maintained; others have not been constructed at all, and therefore, of course also, have not been maintained. Why does not the obligation to construct and maintain still exist? The only answer is that for some considerable time it has not been enforced. The complete answer to that is, that there has been no company really against which the obligation could be enforced. These were accommodation works to be constructed and maintained in connection with a line of railway open for traffic; there never has been any line of railway open for traffic, and the occasion for which these accommodation works had to be constructed, and for which they had to be maintained, has not yet arisen: the time has not arrived. That seems to me to be a sufficient answer, quite apart from others. I am not sure that there are not others equally conclusive.

Then the only remaining point is, Can this obligation be enforced in an action of this kind? I asked for some authority for it, because there is some little difficulty in applying the doctrine of specific performance to these matters. There certainly are things here which the Court of Chancery would have hesitated to say ought to be specifically performed; and even at the present day, as I pointed out to Mr. *Renshaw*, specific performance will probably have to be enforced by sequestration if the contract were not performed. But I do not see how a Court could take upon itself to see that these works were constructed, still less to insist upon their maintenance. I have, however, been referred to what I may now regard as a work of undoubted authority—I mean the present edition of Sir *Edward Fry's* work on Specific Performance (1)—and to a passage in it which is well worth attention. The learned author says this: "Whether the Court will, or will not, interfere to enforce all such contracts"—that is, contracts for building and other works of that kind—"when definite, it appears to be settled that it will assume juris-

(1) 3rd Ed. p. 46, pl. 103.

diction where we have the following three circumstances: first, that the work to be done is defined; secondly, that the plaintiff has a material interest in its execution, which cannot adequately be compensated for by damages; and thirdly, that the defendants have by the contract obtained from the plaintiff possession of the land on which the work is to be done." Then he refers to cases of accommodation works. The present case seems to me to come strictly within that statement of the law, although the company are to do these things on the land which they have obtained by conveyance from the predecessors in title of the Plaintiff.

It does not seem that there are any reported authorities that apply precisely to such a case as this. There is one part of the covenant as to which I see very great difficulty even on that footing. The covenant is "that the said railway company, their successors and assigns, shall and will at all times, on receiving twenty-four hours' previous notice, take and safely convey all timber poles and faggot wood and other produce of the said *Colvethick Wood* from the said road on the west side of the railway, or from such other place at the foot of the said wood by the side of the said railway where the same respectively may be lying or stored, across the railway and deposit the same" at the stores of the Plaintiff. There is great difficulty about this, and one of the defences takes the objection that this is a personal service. I am not aware of any case in which the Court has gone so far as to decree specific performance of any contract of that kind; but I mean to venture so far in the present case, and on the following grounds. In the first place, this is only part of a larger contract which I have no doubt can be ordered to be specifically performed, and, although it is a contract that certain works shall be done by one of the contracting parties, now represented by the *Minerals Company*, it is to be done for their convenience and on their land, the object obviously being to enable that to be done on their land which could not be done by the Plaintiff, or those claiming through him, without either risk to him or them, or serious business risk to the public traffic. It is a special contract of service, and I think, on those grounds, may safely be ordered to be performed with the other

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provisions of the contract. I agree, I do not see how that can possibly be enforced, if the railway company are recalcitrant, otherwise than by a sequestration. I do not think it is possible for the Court to undertake to appoint a receiver or officer to look after it and take it into his own control; but a sequestration would probably be an adequate remedy.

That really disposes of the case; but there may be a good deal to be said on the 15th section of the Act of 1892. I have intentionally passed it by because Mr. *Warmington* appealed to me to decide nothing between the two companies except so far as was absolutely necessary for this purpose; but I shall not be rejecting that appeal in the slightest degree in adding that, as it seems to me, this obligation is not within sect. 15. In the first place—to take the last division first—it was certainly an obligation known to the *Fowey Company*, being a covenant by themselves; and secondly, the combination of the first, second, and third paragraphs of that section point directly to a debt in the ordinary sense of the word—at any rate, to something which is capable of being reduced to money value; and it does not point to anything like the present, which is an obligation to construct and maintain works. Beyond that I do not think it is necessary to say anything.

Therefore there will be a declaration that the covenant ought to be specifically performed by the *Cornwall Minerals Railway Company*, and that will be adjudged accordingly in the ordinary way. Nothing will be said against the *Fowey Company* at all. They will have no costs: they must fight that out hereafter with the *Minerals Company* in whatever proceedings are necessary for the purpose: and the *Minerals Company* will pay the costs of the Plaintiff.

With regard to the form of the judgment, I wish as far as possible to follow the case of *Greene* v. *West Cheshire Railway Company* (1). I will therefore make a declaration "that the covenants contained in the deed dated the 31st of December, 1873, for the construction and maintenance of accommodation works and performance of other works, and which are set forth in the statement of claim, are, having regard to the provisions of

(1) Law Rep. 13 Eq. 44.

the *Lostwithiel and Fowey Railway Act*, 1892, to be specifically performed and carried into execution by the Defendants, the *Cornwall Minerals Railway Company*; and order and adjudge the same accordingly."

Renshaw:—

Will your Lordship go on to order the work to be done in detail, the road to be constructed, and so on?

KEKEWICH, J.:—

No. I will reserve liberty to apply. As I have said, the *Minerals Company* will pay the Plaintiff's costs.

Solicitors: *R. W. Childs, Batten, & Harling*, agents for *W. Pease, Lostwithiel; Hargrove & Co.; R. A. Read, junior.*

G. I. F. C.

WELLBY *v.* STILL.

[1891 W. 39.]

Costs—Taxation—General Order under Solicitors' Remuneration Act, 1881 (44 & 45 *Vict. c.* 44), *Sched. I., Part I.—"Deducing" Title—Mortgage of Leaseholds—Abstract of Title consisting solely of Leases to Mortgagor.*

A solicitor to a mortgagor of leaseholds, who simply produces and delivers an abstract of the leases under which the mortgagor holds, has not deduced title within the meaning of Sched. I., Part I., of the General Order under the *Solicitors' Remuneration Act*, 1881, and consequently is not entitled to charge the scale fee.

ADJOURNED SUMMONS.

The Applicants were a firm of solicitors who were employed by the mortgagor of leasehold property to act for her in the matter of two mortgages for £3400 and £2300 respectively.

The property was comprised in several leases granted to the mortgagor, such leases being to a great extent in identical terms. The abstract of title delivered by the solicitors consisted solely of the leases.

The abstract did not contain a separate statement of each

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lease, but was abbreviated by reference to a general form containing a statement of the covenants and conditions which were contained in each of the leases.

The mortgages were completed, and the solicitors by their bill of costs charged two scale fees of £37 and £28 respectively in respect of the mortgages "for deducing title to leasehold property, perusing mortgage, and completing," according to Sched. I., Part I., of the General Order under the *Solicitors' Remuneration Act*, 1881.

The Taxing Master, being of opinion that the solicitors had not deduced title within the meaning of the General Order, disallowed the scale fees, and taxed off a considerable portion of the bill.

This was a summons to review the taxation.

Renshaw, Q.C., and *Yate Lee*, in support of the summons:—

We submit that the scale fee is chargeable. Though the abstract of title simply consisted of the leases, it was nevertheless a sufficient abstract of the only title there was to shew. In *Ex parte Mayor of London* (1), all that the solicitor did was to examine a single Act of Parliament, and he was held to be entitled to charge the scale fee as having investigated the title. That case is an authority to shew that, though the work done is of the slightest character, the scale may be applicable. The solicitors were not bound to deliver an abstract of title. In order to entitle them to the scale fee, it is sufficient that they have deduced title.

Upjohn, for the client, was not called upon.

KEKEWICH, J.:—

In my judgment no title has been deduced in this case. By the General Order under the *Solicitors' Remuneration Act*, 1881, Sched. I., Part I., a scale fee is made chargeable by "mortgagor's solicitor for deducing title to freehold, copyhold, or leasehold property, perusing mortgage, and completing." Of course, in the case of a mortgage of leaseholds it may happen that the title of

(1) 34 Ch. D. 452.

the lessor has to be investigated; but it is not pretended that that was done here, and we know that it is now very seldom done.

In this case the only title-deeds produced were the leases under which the mortgagor held. The only abstract delivered contained particulars of the leases in a short form, and that abstract was accepted by the mortgagees as sufficient. The mortgagor being the original lessee, there was, beyond that, no title to deduce. Speaking subject to correction, I cannot myself think that it was intended so to misapply language as to say that title is deduced when all that is done is to hand over to a purchaser or mortgagee the original deed under which the vendor or mortgagor holds. That is a state of circumstances which will rarely occur in the case of freehold property, because in the absence of special contract the title has to be carried back for several years, and some other documents are almost certain to be required. It is not likely that there will be simply a conveyance in fee to the mortgagor dated forty years ago, and directly you come to a case of heirship, the title of an eldest son or the like, some documents are required over and above the abstract of the original conveyance. But where the property is leasehold, I cannot say that simply producing a lease is deducing a title. Perhaps in the expression which I have just used I have indicated my view in a compendious form. The one is production, and the other is deduction. You produce a lease, and you deduce a title.

Solicitors: *Trower, Freeling, & Parkin; Robert Chapman.*

C. C. M. D.

KEKEWICH, J.
1894
Aug. 4.

In re EDWARDS.
EDWARDS *v.* EDWARDS.

[1894 E. 1687.]

Will—Construction—"Die without leaving any Male Issue"—Indefinite Failure of Issue—Estate Tail or in Fee Simple—Wills Act (1 *Vict. c.* 26), *s.* 29.

Sect. 29 of the *Wills Act* applies to the case of a gift over on death without "male" issue.

Where, therefore, lands were devised to *A.*, his heirs and assigns, with a gift over if *A.* should "die without leaving any male issue":—

Held, that *A.* took an estate in fee simple subject to an executory devise over.

Upton v. *Hardman* (1) followed.

Adjourned Summons.

Thomas Edwards, by his will dated the 22nd of October, 1881, devised the whole of his freehold estate, situate in the township of *Burton* in the county of *Denbigh*, to his son *John Edwards* for his life, and immediately after his decease gave and devised the estate as follows: The testator gave and devised a farm and lands called *Town Ditch* to *Thomas William Edwards*, his heirs and assigns, he paying to his two elder sisters, *Elizabeth Gertrude Edwards* and *Emily Edwards*, the sum of £100 each within twelve calendar months from the time of his coming into possession of the said property; and the testator gave and devised a farm and lands called *Golly Farm* to *John Howard Edwards*, his heirs and assigns, he paying to his youngest sister, *Mary Edwards*, the sum of £100 within twelve calendar months from the time of his coming into possession of the said property; and the will contained the following proviso: "Provided always that in case the said *Thomas William Edwards* and *John Howard Edwards*, or either of them, shall die without leaving any male issue, then I direct that the property so given and devised to them and their heirs as aforesaid shall after their respective deaths go to the male issue of my said son *Thomas Edwards*." The testator appointed "his said sons" *John Edwards* and *Thomas Edwards*,

(1) Ir. R. 9 Eq. 157.

and his grandson *John Henry Edwards*, trustees and executors of his will.

By a codicil dated the 8th of March, 1884, the testator revoked the appointment of "his said son" *Thomas Edwards* as trustee and executor, and appointed *John Edwards* and *John Henry Edwards* trustees and executors of his will.

The testator died on the 26th of March, 1884.

The testator's son, *John Edwards*, died on the 6th of April, 1890, leaving six children, viz., *Thomas William Edwards*, *Elizabeth Gertrude Edwards*, *John Howard Edwards*, *Emily Edwards*, and *Mary Edwards* (all named in the will), and *Bertha Edwards*. *Thomas William Edwards* had issue one son only, viz., *Ernest Stanley Edwards*.

Thomas Edwards, described in the will as the son of the testator, was, in fact, illegitimate. He died on the 27th of July, 1891, leaving four sons, of whom *John Henry Edwards* in the will named was one.

The sums of £100 mentioned in the will remained unpaid.

This summons was taken out in the *Liverpool* District Registry by *Thomas William Edwards* and a mortgagee from him as Plaintiffs against *John Howard Edwards* and the other children of *John Edwards* named in the will, and *John Henry Edwards* and *Ernest Stanley Edwards* as Defendants, asking (*inter alia*) that it might be determined who, upon the true construction of the will and in the events which had happened, were entitled to the freehold estate in the township of *Burton* devised by the will, and in what shares and proportions.

In the first instance the question (which alone calls for a report) was argued whether the devisees, *Thomas William Edwards* and *John Howard Edwards*, took estates in tail male, or estates in fee simple subject to executory devises over.

J. Paul Rylands, for the Plaintiffs and the Defendants *John Howard Edwards* and *Ernest Stanley Edwards*:—

I submit that *Thomas William Edwards* and *John Howard Edwards* respectively take under the will estates in tail male. Before the *Wills Act* the words of the gift over in the event of a devisee dying "without leaving any male issue" would have

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been held to import an indefinite failure of his issue, and there is nothing in sect. 29 of the *Wills Act* (1) to alter the effect of such a gift. The section ought to be construed strictly, and the application of it is limited to cases in which the phrases "die without issue," "die without leaving issue," or "have no issue," or their equivalents, are used. "Die without leaving any male issue" is an essentially different phrase, and the use of the word "male" is an indication of a contrary intention within the section.

P. O. Lawrence, for the Defendants *Elizabeth Gertrude Edwards*, *Emily Edwards*, and *Mary Edwards*, adopted the same arguments.

Roger B. Lawrence, for the Defendant *John Henry Edwards*:—

I submit that each of these devisees took an estate in fee simple, subject to an executory devise over in the event of his death without leaving male issue. The case of *Upton* v. *Hardman* (2) is precisely in point, and shews that sect. 29 of the *Wills Act* applies to the case of a gift over on death without "male" issue. That case was decided by the Court of Chancery in *Ireland* in the year 1874, and, being a decision upon a question of title which must have often been acted upon, ought not to be lightly disturbed.

Rylands, and *P. O. Lawrence*, were heard in reply.

KEKEWICH, J.:—

There does not seem to me to be any foundation for the argument that there is here an indication of a "contrary intention" within the meaning of sect. 29 of the *Wills Act*. If that section

(1) By sect. 29 of the *Wills Act* it is provided as follows: "In any devise or bequest of real or personal estate the words 'die without issue,' or 'die without leaving issue,' or 'have no issue,' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise."

(2) Ir. R. 9 Eq. 157.

is applicable, there are no words in the will to which my attention has been called or which I can find that will in any way come within the meaning of the words "contrary intention." A testator may say, "Notwithstanding the *Wills Act*, I do not mean words importing want or failure of issue to be construed in the way in which the Legislature has said they shall be construed." Of course, what he may say in express words he may say by language which does not fairly admit of any other construction. But in this case I cannot get out of the section on any such ground.

Is there, then, in this will any reference to such a want or failure of issue as is hit by sect. 29 of the *Wills Act*? In other words, as regards this particular will and the particular expression used in it, is the law altered by the legislative provision? The section speaks of words which may import either a want or failure of issue. The words used in this will certainly do import a want or failure of issue, though restricted to "male" issue. The Act says that in any devise or bequest of real or personal estate a particular construction shall be given to the words "die without issue" or "die without leaving issue" or "have no issue"—neither of which sets of words occurs here—or "any other words importing a want or failure of issue." Now, in construing those latter words, I must hold, on the most elementary principle of construction, that they bring in under the operation of the enactment some phrase other than those which are before specified; that is to say, that the other words which are to import a want or failure of issue are words other than "die without issue" or "die without leaving issue" or "have no issue." It is said that they ought not to be read as covering the expression which I have here—"die without leaving any male issue." That is a curious question which might deserve much consideration, and, if I were called upon to decide it for the first time, I should like to look into it a little more, and perhaps go back to some old cases to ascertain precisely the nature of the distinction between the words "die without issue" and the words "die without male issue." But the exact point was raised before the Court of Chancery in *Ireland* in *Upton* v. *Hardman* (1). I

(1) Ir. R. 9 Eq. 157.

KEKEWICH, J.

1894

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have the report now before me, but I have no note in my copy of the report. I have sent for Mr. *Theobald's* book, not to quote it as an authority, but because it is a book in the hands of the profession, and accepted as a good text-book by practitioners. The edition before me is the third, which was published in 1885, that is to say, eleven years after the decision in *Upton* v. *Hardman* (1), and Mr. *Theobald's* statement of it is as follows: "The words dying without male issue will, under this section, be restricted to male issue living at the death of the ancestor" (2). That is quite accurate; but the value of the reference is not that Mr. *Theobald* thought that was the decision, but that he gives a note of the decision without any reference to any other case or any comment or criticism of any kind. In order to carry the matter one step further, I have sent for the last edition of *Jarman* on Wills. I have not had time to refer to the text, but I have looked at the table of cases, and I cannot find that *Upton* v. *Hardman* is referred to. I suppose that the editor of *Jarman* on Wills thought that Irish cases did not fairly come within his province, and it is not for me to blame that industrious editor for so thinking. I am of course at liberty to decide as I think right according to the construction of the Act, and not to follow the Irish decision if I think it wrong. But this is a question of title, and in dealing with such questions the Court has always considered itself fettered by any decision, or even by the practice of conveyancers which ought not to be lightly upset. It is impossible not to think that between 1874 and 1894 titles under forms of gift similar to that now in question may have passed and probably passed on the authority of that case, and I do not think I can properly criticise it now. I think if it is to be upset, that can only be done on full consideration by a higher tribunal. I must hold that the devisees in this case take estates in fee simple, subject to executory devises over in the event of their respective deaths without leaving any male issue.

Solicitors: *Clement W. Tibbits, Liverpool; J. W. Dalton, Liverpool.*

(1) Ir. R. 9 Eq. 157.

(2) *Theobald* on Wills, 3rd Ed. p. 495.

C. C. M. D.

KEKEWICH, J.
1894
Aug. 8.

In re HOWELL-SHEPHERD. CHURCHILL *v.* ST. GEORGE'S HOSPITAL.

[1894 H. 1567.]

Will dated 1887—*Gift of* £3 *per cent. Annuities*—*National Debt* (*Conversion*) *Act*, 1888 (51 & 52 *Vict. c.* 2), *s.* 25, *sub-s.* 2.

In the first branch of sub-sect. 2 of sect. 25 of the *National Debt* (*Conversion*) *Act*, 1888, instrument includes a will.

North, J.'s, explanation of the sub-section in *Duke of Northumberland* v. *Percy* (1) adopted.

AUGUSTUS HOWELL-SHEPHERD by his will, dated the 3rd of October, 1887, after revoking all former wills, and directing his executors to pay his just debts, funeral and testamentary expenses, and the legacy duty on all the legacies (except the legacies out of the £10,000 £3 per cent. annuities for charitable objects after the death of his wife) and annuities bequeathed by his will, and making certain devises and bequests, gave and bequeathed to his two executors and to his sister, *Mary Churchill*, "the sum of £10,000 New £3 per cent. Bank Annuities (which I direct shall be transferred into their three names as soon as conveniently may be after my decease)," upon trust to apply the dividends in making certain payments for the benefit of his said wife: And after her death the testator directed that the said sum of £10,000 new £3 per cent. annuities should be sold, and bequeathed the proceeds, after satisfying the aforesaid trusts, equally between the forty-six hospitals therein mentioned, one of them being *St. George's Hospital*; and he gave his residuary estate to his said sister and her son absolutely as tenants in common.

By a codicil dated the 28th of February, 1891, after reciting the bequest of the £10,000 £3 per cent. Bank Annuities, and that "since the date of the said will the said £3 per cent. Bank Annuities have been converted into £2 15*s.* per cent. Consolidated Stock: Now I bequeath to my said executors and my said sister *Mary Churchill* the sum of £15,000 £2 15*s.* per cent.

(1) [1893] 1 Ch. 298, 303.

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Consolidated Stock now standing in my name in the books of the Governor and Company of the *Bank of England*, and known as the B Account," upon trust to apply the dividends in making the payments directed by his will to be made for the benefit of his said wife out of the dividends of the £10,000 £3 per cent. Bank Annuities; and he further directed that, in addition to those payments, his executors and his said sister should, out of such dividends, during the life of his said wife, make further annual payments in his said codicil mentioned; and "In all other respects I confirm my said will."

The testator's wife died on the 17th of January, 1892, and he himself died on the 1st of March, 1894. On the 3rd of October, 1887, the date of his will, the testator had standing in his name £14,000 £3 per cent. Bank Annuities, which were subsequently, under the *National Debt (Conversion) Act*, 1888, converted into $2\frac{3}{4}$ per cent. Consolidated Stock. On the 28th of February, 1891, the date of his codicil, and also at the date of his death, he had standing in his name £15,000 $2\frac{3}{4}$ per cent. Consolidated Stock, B Account, of which sum the converted £14,000 formed part.

This was an originating summons taken out by the residuary legatees against *St. George's Hospital* (as representing the several charities named by the testator) and the trustees and executors of the will for the determination of the following questions: (1.) Whether the legacy of £10,000 3 per cents. given by the will had failed by reason of the conversion and payment off of that stock, and whether the charities were entitled to any and what benefits under the bequest; and (2.) Whether the charities had any and what interest in the £15,000 $2\frac{3}{4}$ per cent. stock bequeathed by the codicil?

Warmington, Q.C., and *Methold*, for the Plaintiffs:—

The bequest by the will of the £10,000 £3 per cent. annuities is not specific, and therefore does not come within sect. 25, sub-sect. 2, of the *National Debt (Conversion) Act*, 1888 (1), so as to

(1) Sect. 25, sub-sect. 2, of the *National Debt (Conversion) Act*, 1888, is as follows: "In any Act passed or instrument executed before the passing of this Act references to any stock liable to be converted or exchanged in

make the gift operate as if it had been a gift of an equivalent sum of new stock. Moreover, the gift by the codicil is not of an equivalent sum of new stock, but of a larger sum of £15,000 given upon different trusts, so that the gift by the will must be treated as revoked. Under the section, an equivalent amount of new stock cannot be substituted in a gift of old stock which has ceased to exist: *Duke of Northumberland* v. *Percy* (1). We say, therefore, first, that the charities get nothing; or, secondly, that they do not get more than £10,000 2¾ stock.

Renshaw, Q.C., and *Vaughan Hawkins*, for the Defendant, *St. George's Hospital*:—

We contend that the charities are entitled to £15,000 new stock; or, if not, then to £10,000 new stock. Upon the construction of the will and codicil, taken together, we submit that there is no revocation in the codicil of the trust in the will for the charities, and that the codicil should be read as merely substituting the £15,000 for the £10,000, so as to provide for the increased annual payments during the wife's life, the governing principle in both instruments being to benefit the charities. There being no inconsistency between the two, the codicil cannot be treated as a revocation of the gift in the will: *Lord Lovat* v. *Duchess of Leeds* (2). At all events, we come within the first part of sub-sect. 2 of sect. 25 of the Act, which includes a disposition "by any instrument," and Mr. Justice *North's* observations in *Duke of Northumberland* v. *Percy* (3) support that view: therefore we are at least entitled to the £10,000 new stock.

H. T. Method, for the Defendants, the trustees and executors of the will.

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pursuance of this Act may, if the stock is so converted or exchanged, be construed as references to new stock, and in the case of any testamentary instrument executed before the passing of this Act, any disposition, which, but for the passing of this Act, would have operated as a specific bequest of any such stock, shall if the same is so converted or exchanged be construed as a specific bequest of such new stock, and if the same is not so converted, but is paid off or redeemed, shall be construed as a pecuniary legacy of a sum of money equal to the nominal amount of the stock so paid off or redeemed."

(1) [1893] 1 Ch. 298, 303.

(2) 2 Dr. & Sm. 62, 70.

(3) [1893] 1 Ch. 302–3.

KEKEWICH, J.

1894

In re HOWELL-SHEPHERD. CHURCHILL *v.* ST. GEORGE'S HOSPITAL.

KEKEWICH, J.:—

It is a rule of practical wisdom that a Judge is not allowed to guess, and this codicil forms an apt illustration of the wisdom of that rule. One might without much difficulty, and with some confidence, guess, in reading the codicil, that the testator intended to increase his generosity—that he thought £10,000 at 3 per cent. was not very fairly represented by £10,000 at $2\frac{3}{4}$ per cent., and that it would be better to increase the amount. But then, if you read a little further on, as Mr. *Renhsaw* has pointed out, the amount may have been increased simply in order to provide for the increased payments thereout during the life of the wife. That may have been, not only the governing motive, but the only motive; and there may have been an intention on the testator's part not to give £15,000, but only still to give £10,000. However, he has not said what is to happen to the £15,000 in words which I can in any way construe as a gift, and therefore there is no gift at all of the £15,000.

That being so, the question is, what happens to the gift made by the will? I find no revocation of that gift—certainly not as regards the charities; and it is immaterial to consider whether there is any revocation during the life of the wife. There is none as regards the ultimate gift to the charities. The testator recites it in his codicil: it looks very much as if he were leading up to something like revocation; but it certainly is not expressed, and I do not see that it is necessarily implied.

Then, the legacy of £10,000 standing, what is the meaning of it? It is a demonstrative legacy, not a specific legacy, though very little change in the language would have made it specific, which the testator probably intended it to be; but, there, again, I must not guess—I must take the words as they are. The testator speaks of £10,000 new 3 per cent. annuities; but there is no such thing now standing either in his own name or in the name of any other person. The second branch of sub-sect. 2 of sect. 25 of the *National Debt (Conversion) Act*, 1888, has no application, because there is no specific bequest. I adopt Mr. Justice *North's* explanation of that sub-section in *Duke of Northumberland* v. *Percy* (1). I have no doubt that the pro-

(1) [1893] 1 Ch. 303.

vision in that branch of the sub-section was intended to meet that particular case; but does not that which I have before me here fall within the first branch of the same sub-section, "In any Act passed or instrument executed before the passing of this Act references to any stock liable to be converted or exchanged in pursuance of this Act may, if the stock is so converted or exchanged, be construed as references to new stock"? Why should not that refer to a will? The only possible argument to the contrary is that a "testamentary instrument" is mentioned below, and that therefore the instrument mentioned in the first part cannot be the same thing as the instrument that is specifically mentioned in the second part. That would be a strong argument if all dispositions by will were mentioned in the second part; but they are not. What is dealt with there is, for the reasons mentioned by Mr. Justice *North*, a specific disposition by will; everything else must be presumed to have been intended to fall, as it does in language fall, under the general description of "any instrument," in the earlier part of the sub-section.

The result is that there is a good gift of £10,000 $2\frac{3}{4}$ per cent. Consolidated Stock upon trust for the charities. The costs of all parties will come out of the residue.

Solicitors: *Pyke & Parrott; Palmer, Eland, & Nettleship.*

G. I. F. C.

KEKEWICH, J.
1894
Aug. 9.

DAVIS *v.* FOREMAN.

[1894 D. 1357.]

Injunction—Contract of Service—Negative Clause—Stipulation Negative in Form but Affirmative in Substance.

The principle of *Lumley* v. *Wagner* (1) ought not to be applied to an agreement which, though negative in form, is affirmative in substance.

An agreement for the employment of a manager of a business contained a clause providing that the employer would not, except in the case of misconduct or a breach of the agreement, require the manager to leave his employ. The employer gave to the manager notice purporting to determine the agreement and the service created thereby, and the manager brought an action for an injunction to restrain the employer from acting on the notice:—

Held, that the clause above mentioned, though negative in form, was affirmative in substance, being equivalent to a stipulation by the employer that he would retain the manager in his employ, and that an injunction ought not to be granted.

Lumley v. *Wagner* distinguished.

MOTION.

By an agreement in writing, dated the 1st of June, 1892, and made between the Defendant *Joseph Foreman* (therein called "the employer"), and the Plaintiff *Francis William Davis* (therein called "the manager"), the employer agreed to hire and employ the manager as his manager, to take care of, conduct, and manage the business of a carrier, then and lately carried on by the employer at 6 *High Street, Chatham*, and the manager thereby agreed to serve the employer well, diligently, and faithfully to the utmost of his power as his manager, and take upon himself the care, conduct, and management of the business as from the 1st of June, 1892, until the agreement should be determined by notice or otherwise. The remuneration of the manager was to be all profits which the business should earn over and above the sum of £15 each calendar month, which the employer was to be entitled to draw from the profits of the business, together with interest on the sum of £1000 at the rate of 5 per cent. per annum, and after payment of these two sums the manager was

(1) 1 D. M. & G. 604.

to be entitled to all further profits. When the employer should have received from the business or from the manager the net sum of £1000 payable by instalments of £15 a month from the 1st of June, 1892, after payment of all necessary and incidental expenses and rent, and also interest at the rate of £5 per cent. per annum as above provided, the employer was forthwith to retire from the business, and execute all necessary assurances of the business, with the plant, goodwill, vans, horses, and effects unto the manager absolutely as his property; but the manager was not to have any rights of ownership in regard to the business and plant until the said sum of £1000 and interest had been received by the employer. Clause 7 of the agreement was as follows: "The employer hereby agrees with the manager that he will not, except in the case of misconduct or a breach of this agreement, require the manager to leave his employ and determine this agreement during such period that he shall draw from the said business £15 each and every month, and the said interest as aforesaid; but in the event of the said business failing to realize the said sums, then this agreement and the service hereby created may be determined by either party giving to the other three calendar months' notice for that purpose."

The business was carried on under the agreement until the 3rd of April, 1894, on which day the Defendant gave to the Plaintiff a notice of that date, purporting to determine the agreement and the service thereby created.

The Plaintiff then brought this action, claiming (*inter alia*) an injunction to restrain the Defendant from acting upon the notice, and excluding the Plaintiff from the management of the business, and from the premises whereon the same was carried on, and from dismissing the Plaintiff from his employment under the agreement, or determining the agreement otherwise than in accordance with the terms thereof and upon grounds provided therein.

This was a motion on behalf of the Plaintiff for an interlocutory injunction to the effect lastly stated. Evidence was adduced upon both sides on the question whether or not the Defendant, in the events which had happened, was justified by the terms of the agreement in giving the notice of the 3rd of

KEKEWICH, J. 1894 DAVIS v. FOREMAN.

April, 1894; but his Lordship directed that in the first instance the question should be argued whether, assuming that the giving of the notice was justified, an injunction ought to be granted.

Warmington, Q.C., and *James Bacon*, for the Plaintiff:—

It may be conceded that this agreement, being a contract of service, cannot be specifically enforced, and that in the absence of clause 7 this motion must have failed; but that clause is in express negative terms, and therefore the stipulation contained in it is enforceable by injunction according to the principle of *Lumley* v. *Wagner* (1), which is still a binding authority: *Whitwood Chemical Company* v. *Hardman* (2); *Grimston* v. *Cunningham* (3); *Ryan* v. *Mutual Tontine Westminster Chambers Association* (4); *Donnell* v. *Bennett* (5).

Marten, Q.C., and *Ribton*, for the Defendant, were not called upon.

KEKEWICH, J.:—

In many cases of this class the arguments and judgments have been hampered by the consideration how far the contract could properly be enforced by injunction, when as a whole it would not be a proper subject of a decree or judgment for specific performance. I have nothing to do with that here. In many cases, too, there has been a very instructive inquiry how to draw the line between those contracts which are expressly negative and those which only imply the negative in the affirmative form. Mr. Justice *Fry*, in *Donnell* v. *Bennett*, states the difficulty which he entertained, and which many other Judges have entertained, in drawing any substantial or tangible distinction. I have really nothing to do with that, because here I have in clause 7 of this agreement a stipulation which, in point of form, is not affirmative at all, but is distinctly negative. There however, to my mind, the description of the stipulation as negative ceases to be accurate. It is, I think, distinctly affirmative and positive

(1) 1 D. M. & G. 604.
(2) [1891] 2 Ch. 416.
(3) [1894] 1 Q. B. 125.
(4) [1893] 1 Ch. 116.
(5) 22 Ch. D. 835.

in substance, and the negative part of it is a mere form. In that respect this agreement differs entirely from that in *Lumley* v. *Wagner* (1), where there was a distinct engagement by the defendant (which is set out on p. 606 of the report) that she would not use her talents at any other theatre than the plaintiff's. What the Court there had to consider was not the engagement of the defendant, and how far that could be enforced, but whether she could with propriety remove her services from the plaintiff and transfer them to another theatre. The Court has declined to extend the principle of *Lumley* v. *Wagner*. The matter has been gone into time after time by different Judges, and Vice-Chancellor *Malins*, in *Montague* v. *Flockton* (2), applied what he and some others conceived, to be the principle of *Lumley* v. *Wagner*; but the Court of Appeal, in the recent case of *Whitwood Chemical Company* v. *Hardman* (3), have held that the Vice-Chancellor acted as he did in misapprehension of the real decision in *Lumley* v. *Wagner*. Again, there is a well-known case, in another branch of practice and experience, but coming within the same lines, of *De Mattos* v. *Gibson* (4), where the negative stipulation was not expressed, but was implied, and the Court granted an injunction. It seems, however, to be perfectly settled that an agreement for personal service cannot be enforced otherwise than by an action for damages, though it may possibly be enforced in certain exceptional cases, not to be extended, where there is a strictly negative stipulation. In the case which I have already referred to of *Donnell* v. *Bennett*, Mr. Justice *Fry* says (5): "If . . . the breach of the contract is properly satisfied by damages, then the Court ought not to interfere whether there be or be not the negative stipulation. That, I say, appears to me to be the point towards which the authorities are tending, and I cannot help saying that in my judgment that would furnish a proper line by which to divide the cases." I do not find that that has been adopted in the other cases, but they are quite consistent with it. Now, having regard to the principle expounded by the Court of Appeal in *Whitwood Chemical*

(1) 1 D. M. & G. 604.
(2) Law Rep. 16 Eq. 189.
(3) [1891] 2 Ch. 416.
(4) 4 De G. & J. 276.
(5) 22 Ch. D. 837.

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Company v. *Hardman* (1), and recognised again in the case of *Ryan* v. *Mutual Tontine Westminster Chambers Association* (2), which is not directly in point, what ought I to do here, in dealing with a covenant or stipulation which, as I have said, though negative in form is positive in substance? There is a clause in the agreement that the employer will not, except in the case of misconduct or a breach of the agreement, require the manager to leave his employ—in other words, give him notice to quit. That is, to my mind, distinctly equivalent to a stipulation by the employer that he will retain the manager in his employ. It is only the form that is negative. If the Court comes to the conclusion that that is really the substance of the agreement (which, being an agreement of service, cannot be specifically enforced), is it right, having regard to the line the authorities have taken, to say that merely because the agreement is negative in form an injunction ought to be granted? To my mind, I should be going distinctly against the last decision in the Court of Appeal if I were to apply the doctrine of *Lumley* v. *Wagner* (3), which is not to be extended, to a case of this character. The motion must therefore be refused; the costs to be the Defendant's in any event.

Solicitors: *Halses, Trustram & Co.*, agents for *Greathead & Goldie, Rochester; W. A. E. Headley*, agent for *A. Booth Hearn, Chatham.*

(1) [1891] 2 Ch. 416. (2) [1893] 1 Ch. 116.
(3) 1 D. M. & G. 604.

C. C. M. D.

COLLIS *v.* LAUGHER.

ROMER, J.

1894

June 21, 22.

[1894 C. 190.]

Easement—Light and Air—Unfinished House—Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *ss.* 3, 4.

A right to the light and air coming to the windows of a building, which may grow into the statutory right acquired by twenty years' user and enjoyment as of right and without interruption, commences when the exterior walls of the building with the spaces for the windows are completed, and the building is properly roofed in, although the window-sashes and the glass may not be put in and the interior may not be finished until some time afterwards.

Courtauld v. *Legh* (1) followed.

THE Plaintiff *J. Collis* was the owner of a freehold house at *Bishop Stortford*, in the county of *Hertford*, and the Plaintiff *C. Brand* was the lessee of the same house. The Defendant, *H. Laugher*, was the owner of the premises adjoining the north side of the Plaintiffs' house, and in May, 1893, he erected a hoarding on his premises in front of and about eighteen inches from two windows in the north wall of the Plaintiffs' house, and thereby seriously obstructed the light and air coming through the said two windows into the Plaintiffs' house.

On the 16th of January, 1894, the Plaintiffs commenced this action, and claimed an injunction to restrain the Defendant from obstructing the access of light and air to the Plaintiffs' windows. On a motion for an interim injunction it was by consent arranged that the motion should stand over until the trial of the action, that in the meantime the hoarding should be forthwith removed and not re-erected until after the trial of the action, and that the Defendant should have the same benefit, by way of defence to the action in respect of the said windows, as he would have had if the obstruction had not been removed.

This was the trial of the action, and the question at issue was whether the said two windows on the north side of the Plaintiffs' house were ancient lights.

It appeared from the evidence that in the year 1873 the piece

(1) Law Rep. 4 Ex. 126.

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of land on which the Plaintiffs' house now stood belonged to the trustees of the will of *J. Tucker*, deceased; that in the summer of 1873 the house that then stood on the said piece of land was burnt down; that about October, 1873, one *Cornwall* entered into a contract with *J. Tucker's* trustees to build a new house on the same site; that by the 13th of December, 1873, the exterior walls of the new house, with the spaces for the windows, were completed, and the house was roofed in and slated, but the window sashes and the glass were not put in and the interior of the house was not finished until the beginning of 1874; and that in May, 1874, the Plaintiff *J. Collis* went into occupation of the new house as tenant of *J. Tucker's* trustees, from whom he subsequently purchased the freehold.

Neville, Q.C., and *Howland Jackson*, for the Plaintiffs:—

For twenty years before the date of the issue of the writ in this action—that is, from the 16th of January, 1874—the light coming to these two windows on the north side of this house has been enjoyed as of right and without interruption within the meaning of sects. 3 and 4 of the *Prescription Act*. Our evidence shews that the house was structurally completed externally in the month of December, 1873. It is not necessary that the window sashes should be put in, or the house be habitable internally for the whole of the statutory period. The case falls within the principle of *Courtauld* v. *Legh* (1). Directly the light had been enjoyed nineteen years and one day the statutory right was complete. The hoarding erected in May, 1893, was not acquiesced in, but the action could not be commenced until the twenty years had expired: *Flight* v. *Thomas* (2).

Oswald, Q.C., and *O. L. Clare*, for the Defendant:—

The case of *Courtauld* v. *Legh* is distinguishable. There the windows were in and the building was complete externally during the whole of the twenty years, and the question was whether it was necessary that the interior of the house should be fit for habitation and occupied during the statutory period. Here, it is clear that on the 16th of January, 1874, the house

(1) Law Rep. 4 Ex. 126. (2) 11 A. & E. 688.

was not externally complete, for the window sashes and glass were not put in, and it is evident that the interior of the house was not fit for habitation for some time afterwards.

Neville, in reply.

ROMER, J. :—

I think the Plaintiffs are entitled to succeed. It appears to me that the Plaintiffs' dwelling-house has, within the words of sect. 3 of the *Prescription Act*, enjoyed the access and use of light by means of these two windows for the whole period of twenty years before the commencement of this action, and that without interruption, treating interruption as defined by sect. 4. The evidence adduced on behalf of the Plaintiffs has, I think, satisfactorily and completely established that their house was finished as a building by the 13th of December, 1873—completed, I mean, in this sense, that all external work was done, the walls were finished, and the windows placed in the position they have ever since occupied as and for windows, the joists were in for the different landings, and the roof was put on and completely tiled. The building externally, for all external purposes, was completed, and wind and weather tight. It is true that it was not completely finished inside so as to be actually fit for habitation by the 16th of January, 1874. For example, in the windows the sashes were not put in, and still less the glass, the floors were not completely laid on the joists, and it is plain that the gas and the water were not completely laid on. But it is not necessary, in order that time may run in favour of the owners of a building like this, that it should either be occupied or be completely fit for habitation. That is shewn by the case of *Courtauld* v. *Legh* (1), from which the present only differs in matters, in my opinion, of unimportant detail. Through these windows—and I use that term of course, not as meaning a complete window in the most modern sense as fitted with sashes and glass, but as meaning an opening for the building through which light can be obtained and the benefit of the light—through these windows, as from the 13th of December, 1873,

(1) Law Rep. 4 Ex. 126.

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this building has enjoyed the light. For example, how was it that the gas man, who went in to lay the gas on the 5th of January, was able to do it completely? Doubtless he availed himself of the light coming through these windows when he had to do that part of his work which was on the part of the house adjacent or near to these windows. The Plaintiffs have, in my opinion, established their right to come to the Court on the 16th of January, 1894, and seek for the injunction they ask as against the Defendant. The obstruction put up by the Defendant has been removed under an arrangement between the parties by which it has been agreed that the question of right should be tried as if the obstruction still continued. Under those circumstances all I need do is to grant an injunction against this Defendant to restrain him from interfering with the Plaintiffs' ancient lights in question.

Solicitors for Plaintiffs: *Thorneycroft & Willis*, agents for *Baker & Thorneycroft, Bishop's Stortford.*

Solicitors for Defendant: *Walker, Son, & Field*, agents for *W. Gee & Son, Bishop's Stortford.*

H. L. F.

JOHNSON *v.* GEORGE NEWNES, LIMITED.

ROMER, J.

1894

June 27, 28.

[1893 J. 1957.]

Copyright—Series of Stories in Periodical—Retention of Copyright by Author—Infringement—Right to Sue before Publication apart from Periodical—"Book"—Separate Publication—Registration—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 3, 18, 19.

The author of a contribution to a periodical who has not parted with his copyright to the proprietor of the periodical may sue an infringer before publishing his contribution in a separate form.

And where the author has registered the series of contributions to the periodical, stating as the date of first publication the date when the first part was published in the periodical, the effect of sect. 19 is that the registration protects each contribution of the series which has been subsequently so published.

HENRY THOMAS JOHNSON was the author of a series of short stories which appeared from time to time in a newspaper called the *Weekly Dispatch*, under the general heading of "Birds of the Night." The stories had also separate names, and had only a slight connection with each other. They depicted the real or imagined experiences of the writer and other persons in *London* after dark. The first chapter or story appeared with a separate sub-heading in the *Weekly Dispatch* of the 8th of September, 1893, and in the issue of that periodical which was published on the 19th of November, 1893, the eleventh chapter appeared, headed as follows: "Birds of the Night. By *Henry T. Johnson*, Author of 'That Man Cheedlepump,' 'Jack of Hearts,' &c. 'XI. The Cabman's Story.'"

The *Weekly Dispatch* itself was registered at *Stationers' Hall* on the 13th of April, 1892. *Johnson* registered "Birds of the Night" at *Stationers' Hall* on the 7th of December, 1893; but there was no separate registration of "The Cabman's Story." The certificate of registration stated the date of first publication to be the 8th of September, 1893.

Tit-Bits was a weekly journal published by *George Newnes, Limited*, and in the number of *Tit-Bits* published on the 2nd of December, 1893, the contribution called "The Cabman's Story"

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was substantially copied, only some slight variations being introduced. The contribution had been sent to *Tit-Bits* in answer to an offer of a prize of one guinea for the best story, which prize was obtained by the sender. The publishers of *Tit-Bits* were not aware that the contribution was a copy of "The Cabman's Story," by *Johnson*.

Johnson was not on the permanent staff of the *Weekly Dispatch*. He was paid by the proprietors for his contributions under the heading of "Birds of the Night," the arrangement between them being that *Johnson* should have the right of separately publishing the stories, provided such separate publication did not take place till after all the stories had appeared in the *Weekly Dispatch*.

Johnson, after registering his copyright, brought an action against *George Newnes, Limited*, alleging himself to be "the author and registered proprietor of a subsisting copyright in a book entitled "Birds of the Night," and claiming an injunction to restrain the Defendants from continuing to infringe such copyright, an account of profits, and delivery up of all copies in the Defendants' possession of the portion of the book which had been copied.

By their defence the Defendants denied that the Plaintiff was the proprietor of any copyright in "Birds of the Night" or in "The Cabman's Story," and said that neither publication was a book within 5 & 6 Vict. c. 45, or capable of registration as such. The Defendants also pleaded in the alternative, that the Plaintiff was not the first publisher of either publication, and that in any case the date of first publication was not truly stated. They also alleged that the story was not a serial, and that the true name—viz., "The Cabman's Story," not "Birds of The Night," was not registered. The action was tried before Mr. Justice *Romer* on the 27th and 28th of June, 1894 (1).

(1) The following are the provisions of the *Copyright Act*, 1842, (5 & 6 Vict. c. 45), which were referred to in the argument:—

Sect. 2: "And be it enacted, that in the construction of this Act the word 'book' shall be construed to mean and include every volume, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart, or plan separately published . . . . ."

Sect. 3: "And be it enacted, that the copyright in every book which

Up to the time of the trial the Plaintiff had not published "Birds of The Night" or any part thereof, otherwise than in the *Weekly Dispatch.*

shall after the passing of this Act be published in the lifetime of its author shall endure for the natural life of such author, and for the further term of seven years, commencing at the time of his death, and shall be the property of such author and his assigns . . . . ."

Sect. 18: "And be it enacted, that when any publisher or other person shall . . . . project, conduct, and carry on, or be the proprietor of any encyclopædia, review, magazine, periodical work, or work published in a series of books or parts, or any book whatsoever, and . . . . shall employ any persons to compose the same, or any volumes, parts, essays, articles, or portions thereof, for publication in or as part of the same, and such work, volumes, parts, essays, articles, or portions shall . . . . be composed under such employment, on the terms that the copyright therein shall belong to such proprietor, projector, publisher, or conductor, and paid for by such proprietor, projector, publisher, or conductor, the copyright in every such encyclopædia, review, magazine, periodical work, and work published in a series of books or parts, and in every volume, part, essay, article, and portion so composed and paid for, shall be the property of such proprietor, projector, publisher, or other conductor, who shall enjoy the same rights as if he were the actual author thereof, and shall have such term of copyright therein as is given to the authors of books by this Act; except only that in the case of essays, articles, or portions forming part of and first published in reviews, magazines, or other periodical works of a like nature, after the term of twenty-eight years from the first publication thereof respectively the right of publishing the same in a separate form shall revert to the author for the remainder of the term given by this Act: Provided always, that during the term of twenty-eight years the said proprietor, projector, publisher, or conductor shall not publish any such essay, article, or portion separately or singly without the consent previously obtained of the author thereof, or his assigns: Provided also, that nothing herein contained shall alter or affect the right of any person who shall . . . . be so employed as aforesaid to publish any such his composition in a separate form, who by any contract, express or implied, may have reserved or may hereafter reserve to himself such right; but every author reserving, retaining, or having such right shall be entitled to the copyright in such composition when published in a separate form, according to this Act, without prejudice to the right of such proprietor, projector, publisher, or conductor as aforesaid."

Sect. 19: "And be it enacted, that the proprietor of the copyright in any encyclopædia, review, magazine, periodical work, or other work published in a series of books or parts, shall be entitled to all the benefits of the registration at *Stationers' Hall* under this Act, on entering in the said book of registry the title of such encyclopædia, review, periodical work, or other work published in a series of books or parts, the time of the first publication of the first volume, number, or part thereof,

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Hopkinson, Q.C., and *F. Dodd*, for the Plaintiff:—

The Plaintiff is the proprietor of the copyright in each story of the series, as well as in the whole series, by virtue of the second proviso in sect. 18 of the *Copyright Act*, 1842.

His right to sue for infringement would only be taken away if it was proved, not only that he had been paid for his services, but also that his work had been composed on the terms that the copyright should belong to the proprietor of the journal: *Walter* v. *Howe* (1). The first part of sect. 18 of the Act, on which the Defendants may rely, was passed for the protection only of publishers of such works as an encyclopædia, or a biographical dictionary, in which each article is separate and distinct.

[ROMER, J.:—The Defendants will say that, assuming you have the copyright, you only have it as from time to time you publish your composition separately from the periodical.]

In that case they would have to rely on the second proviso in sect. 18; but the words "when published in a separate form" are only a limitation of the rights of the author as against the proprietor of the journal, given by a previous part of the section.

[ROMER, J.:—Does not "separately" in sect. 18 mean separately from the periodical in which the composition appears?]

The second proviso only says that the author of the composition may reserve his right to publish in a separate form.

[ROMER, J.:—Who has the right to sue and recover damages after the separate publication has taken place? Is the infringer liable to be sued twice?]

In the case of an encyclopædia or biographical dictionary, either the publisher or the author can sue in respect of an infringement of the copyright of an article.

[ROMER, J., referred to *Smith* v. *Johnson* (2), and *Sweet* v. *Benning* (3).]

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or of the first number or volume first published after the passing of this Act in any such work which shall have been published heretofore, and the name and place of abode of the proprietor thereof, and of the publisher thereof, when such publisher shall not also be the proprietor thereof."

(1) 17 Ch. D. 708.

(2) 4 Giff. 632.

(3) 16 C. B. 459.

[*Neville*, Q.C.:—*Sweet* v. *Benning* (1) was not cited in *Walter* v. *Howe* (2).]

"The Cabman's Story," as part of the series "Birds of the Night," is a "book" within sect. 2 of the Act, and the Plaintiff may sue in respect of the infringement of the copyright in this story quite apart from the provisions of sects. 18 and 19.

The author is the proprietor unless he has assigned the entire copyright: sect. 3.

The Defendants cannot escape liability on the ground that they were only publishing a part of the Plaintiff's work: *Trade Auxiliary Company* v. *Middlesborough and District Tradesmen's Protection Association* (3).

The Defendants say that the Plaintiff cannot sue for infringement of the copyright in "The Cabman's Story" because it was not published till November, 1893, after the Plaintiff had registered the date of first publication as the 8th of September, 1893. But that was the correct date, as it was the date of publication of the number containing the first part of "Birds of the Night." The first registration protects the unpublished and future parts of the series: sect. 19; *Bradbury* v. *Sharp* (4). There was no necessity to register "The Cabman's Story" separately; the protection of the copyright runs from the date of registration of "Birds of the Night."

Registration does not create the copyright; it is only a condition precedent to the right to sue.

It is immaterial that the Defendants were not aware they were infringing a copyright, and were misled by the contributor to their publication.

[They also referred to *Mayhew* v. *Maxwell* (5).]

Neville, Q.C., and *F. Watt*, for the Defendants:—

An author can only reserve such copyright as comes within the proviso in sect. 18 of the Act, and that proviso only applies where persons are employed to compose literary works for publication as mentioned in the section. Sect. 19 vests in the

(1) 16 C. B. 459.
(2) 17 Ch. D. 708.
(3) 40 Ch. D. 425.
(4) W. N. (1891) 143.
(5) 1 J. & H. 312.

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proprietors of the journal the only copyright in the stories of the series comprised in "Birds of the Night." If the Plaintiff has any rights under the proviso in sect. 18, the effect of sect. 2 is that he has no copyright in "The Cabman's Story" until it is separately published; until such separate publication takes place the story is not a "book."

[ROMER, J.:—Was there not a separate publication of each story of the series in the number of the *Weekly Dispatch* in which it appeared?]

The author is not entitled to sue as owner of the copyright in each separate story; and, moreover, the Plaintiff has not registered "The Cabman's Story" so as to comply with sect. 19, inasmuch as it was a separate work, and not a "volume, number, or part" of a periodical or other work. "The Cabman's Story" was not published till more than two months had elapsed from the date which the Plaintiff registered as "the time of the first publication," and this prevents him from suing.

Hopkinson, in reply:—

If by the terms of arrangement the copyright in a composition does not belong to the proprietor of the journal, it remains in the author of the composition, and the proprietor of the journal cannot publish it in a separate form: *Bishop of Hereford* v. *Griffin* (1). It would be absurd to say that other people could publish it. It is no objection that the author has not registered the article: *Mayhew* v. *Maxwell* (2).

[He also cited *White* v. *Geroch* (3).]

ROMER, J.:—

The Plaintiff is clearly the author of this story, which appeared in *Tit-Bits*. It was one of a series of stories published by him under the description of "Birds of the Night." He published that series of stories as parts of a work in the *Weekly Dispatch*, each part appearing in one of the weekly numbers of the *Weekly Dispatch*, and each part in itself forming more or less a separate story.

(1) 16 Sim. 190. (2) 1 J. & H. 312.
(3) 2 B. & Al. 298.

The first question that arises is this: Did the proprietors of the *Weekly Dispatch* acquire the copyright of these stories? I have come to the conclusion, on the facts, that they did not. Undoubtedly the Plaintiff was paid by the proprietors of the *Weekly Dispatch* for the permission to the proprietors to insert these stories in their journal; but, although the Plaintiff was paid for it, in my judgment, on the facts, he was not paid on the terms that the copyright in the stories should belong to the proprietors of the journal in question. Therefore, the copyright in these stories remained in the Plaintiff, and the proviso at the end of sect. 18 of the *Copyright Act*, 1842, does not apply, for, in my judgment, that proviso only refers to a case where the author has parted in the first instance with the copyright in his work to the proprietor of the magazine or periodical work in which it afterwards appears.

The next question that arises is this: Has an author who has not parted with his copyright the right to sue an infringer before the author has published his story in a form apart from the form in which it has appeared in a periodical publication? It is said that he has not, not because of the proviso at the end of sect. 18, for I have already dealt with that, but because, it is said, looking at sects. 2 and 3 of the *Copyright Act*, that the author did not acquire the copyright in these separate stories because there had been, and has been up to the present time, no separate publication of those stories in accordance with sect. 2 of the Act.

Now, in my opinion, if you find in a volume separate parts, each distinguished or perfectly distinguishable from the other parts, and the volume is published, each part that is separate and clearly distinguished in the volume itself is separately published within the meaning of sect. 2. To hold the contrary would lead, I may say, to absurdities, and obviously to great injustice being done. That has been pointed out in the course of the argument before me, and I need not point it out more in detail in this judgment.

If that were not the correct view, amongst other results this would follow: that if the author of one story joined with the author of another story, and they published both stories in one

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volume, neither author could sue for an infringement of his story so published unless he took the pains first to take his own story out of the book in which the two stories had been published and publish it separately, and by itself. In my judgment, such an absurd result is not caused by the *Copyright Act.*

I think that the true construction of "separately published," as used in sect. 2, is that which I have indicated.

It follows that, in my judgment, in this case there was a separate publication of these stories in the *Weekly Dispatch*, and the Plaintiff, as the author of the stories, accordingly acquired copyright under sect. 3 of the Act. The Plaintiff, therefore, had a copyright. He had one thing more to do to entitle him to sue. He was bound to register before he could sue. He has registered. The question remains whether that registration is a proper one. It is said that it is not, because this portion of the author's general work, "Birds of the Night"—"The Cabman's Story"—was a separate work in itself, which was published on the 19th of November, 1893; whereas the registration by the Plaintiff states the date of first publication of his work to be the 8th of September, 1893. But this objection fails when the facts are really looked at. "The Cabman's Story," as I have pointed out, was only a part of a series constituting one work. I think the Plaintiff is right in contending that he comes within the provisions of the 19th section of the Act. I think he was the proprietor of the copyright in a work which had been published in a series of books or parts—the series, I need scarcely say, being the stories the first of which was published on the 8th of September, 1893—and the first part of this work of the Plaintiff was in fact published in the *Weekly Dispatch* of the 8th of September, 1893. That being so, and sect. 19 applying, it is clear that he has registered in due form, and that he is entitled to sue by reason or by virtue of registration, or, rather, he is not prevented from suing by not having complied with the provision as to registration.

That point taken by the Defendants also failing, it follows that the Plaintiff is entitled to relief in respect of the production by the Defendants of this story. Clearly he is entitled to an injunction, and that injunction will be in the usual form.

Then damages are asked for. Now, on the question of damages, it has been agreed that I am to do the best I can, on the evidence before me, to assess the amount of damage the Plaintiff has sustained by reason of this infringement of his copyright. Doing the best I can, and bearing in mind what has been said *pro* and *con.*, I assess the damage at £25; and I order the Defendants to pay the costs of the action.

Solicitor for Plaintiff: *F. Tatton.*
Solicitor for Defendants: *G. Hardman Hoyle.*

F. E.

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[1894 W. 376.]

Building Estate—Adjoining Lessees—Covenants against Building and Annoyance—Erection of Trellis Screen—Injunction.

A lessee covenanted not to erect or build on the demised premises, without the written consent of the lessor, "any other building whatsoever" save and except a stable and coach-house; and also not to do on the demised premises any act, matter, or thing which might be an annoyance or nuisance to any tenant of the lessor. The lessee, without the lessor's consent, erected above his boundary fence an open trellis-work screen of wood about fifty-eight feet long and twelve feet high, which interfered to some extent with the light flowing to the ground-floor windows of the adjoining premises, which were held on lease from the same lessor with covenants similar to those above stated. In an action by the lessor against an assignee of the lease:—

Held, (1.) that under the circumstances the screen was a "building" within the meaning of the covenant against building; and (2.) that it was also an "annoyance," as it interfered with the pleasurable enjoyment of the adjoining premises by the tenant thereof, and an injunction was granted accordingly.

BY an indenture of lease dated the 11th of November, 1878, and made between the Plaintiff *E. Wood* of the one part and *A. Bailey* of the other part, the Plaintiff, "in consideration of the expense incurred by *A. Bailey* in erecting and finishing the dwelling-house thereinafter demised, and of the rents and covenants thereinafter reserved and contained," demised to *A. Bailey* the piece of ground therein described with the dwelling-house

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thereon and the appurtenances, to hold the same unto the said *A. Bailey*, his executors, administrators, and assigns, for the term of ninety-nine years from Michaelmas, 1878, at the rents therein mentioned. And the said *A. Bailey*, for himself, his executors, administrators, and assigns, thereby covenanted with the Plaintiff, his heirs and assigns, and also with the person or persons for the time being entitled in remainder immediately expectant on the determination of the term thereby granted (all of whom were thereinafter referred to as the "lessor parties"), amongst other things, to complete and finish all the external and internal works of the "said dwelling-house and buildings, fences and fence walls," in a sound and workmanlike manner; and not to erect or build or cause to be erected or built upon the said piece of ground thereby demised, without the previous license in writing of the lessor parties, "any other building whatsoever," save and except a stable and coach-house; and to keep in good and substantial repair and to paint the said dwelling-house and premises thereby demised, "and all other erections and buildings which may thereafter be erected upon the said ground"; and not to pull down or injure any of the principal walls or timbers "of the said dwelling-house and premises and other buildings, if any"; and "not to do or suffer to be done on the said premises or any part thereof any act, matter, or thing which may be or become an annoyance, nuisance, or disturbance to the neighbourhood or to any tenant of the lessor parties."

Under and by virtue of deeds of assignment dated the 3rd of July, 1879, and the 2nd of September, 1887, the premises comprised in the said indenture of lease of the 11th of November, 1878, became vested in the Defendant for the unexpired residue of the said term of ninety-nine years, subject nevertheless to the rent reserved by and the covenants by the lessee contained in the said indenture of lease.

By an indenture of lease dated the 14th of September, 1881, and made between the Plaintiff of the one part and *R. Grice* of the other part, the Plaintiff demised the piece of land immediately adjoining the northern boundary of the premises comprised in the said lease of the 11th of November, 1878, unto the said *R. Grice* for the term of ninety-nine years from Michaelmas,

1881, at a certain rent; and by the lease now in statement the said *R. Grice* covenanted for himself and his assigns within twenty-one years from the date thereof to build on the demised land a dwelling-house at a cost of £1200 at the least, the erection to be in accordance with plans and upon a site to be approved by the lessor's architect, and the same lease also contained covenants by the lessee in relation to further buildings and to annoyances and nuisances similar in form (*mutatis mutandis*) to the said covenants contained in the lease of the 11th of November, 1878.

The pieces of land demised by the said leases of the 11th of November, 1878, and the 14th of September, 1881, in fact formed part of a freehold estate of which the Plaintiff was tenant for life with powers of leasing, and which had been laid out for building in accordance with a scheme and plans prepared for that purpose.

Under and by virtue of deeds of assignment dated the 27th of April, 1888, and the 22nd of October, 1892, the premises comprised in the said lease of the 14th of September, 1881, became vested in *F. Neale* for the unexpired residue of the said term granted by the last-mentioned lease, and subject to the rent thereby reserved and to the covenants by the lessee therein contained. At the date of the assignment of the 22nd of October, 1892, no building had been erected on the piece of land comprised in the lease of the 14th of September, 1881; but in 1893 *F. Neale*, in pursuance of the covenant contained in the last-mentioned lease, and in accordance with plans and on a site approved by the Plaintiff's architect, commenced to erect a dwelling-house on the same piece of land. This dwelling-house faced south and stood about sixteen feet from the boundary fence dividing the land comprised in the lease of the 14th of September, 1881, from the land comprised in the Defendant's said lease, and its windows overlooked the Defendant's garden, to which he strongly objected. In January, 1894, *F. Neale* completed his house, and on the 26th of February his family went into occupation of the same. On the 27th of February the Defendant commenced to erect a substantial trellis-work screen on the northern side of his land fronting *F. Neale's* house, who at once communicated

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with *Wood's* solicitors, and they the same day wrote the Defendant as follows:—

"We are informed that you are erecting or preparing to erect a hoarding or trellis-work screen on the northern boundary of the premises leased by you from Mr. *Wood*. As it is contrary to covenants in the lease, and will exclude the light and air from the adjoining premises and be an annoyance to the occupier thereof, we beg to give you notice that if the erection is proceeded with steps will have to be taken to stay its erection, and for its removal if erected."

Notwithstanding this notice, the Defendant proceeded with and completed the screen. This screen stood on the Defendant's land about a foot from the boundary fence (which was a brick wall eight feet high) and was fifty-eight feet six inches in length, and stood twelve feet above the boundary wall.

Thereupon *Wood* commenced this action, and by his statement of claim alleged that he had not consented to the erection of the said screen, and that it was an annoyance, nuisance, and disturbance to the said *F. Neale*, and interfered with the pleasurable enjoyment by him of his said house in the following respects: it obstructed the view from the windows on the south side of the said house; it interfered with the access of light and air to the hall-door and certain of the windows on the south side of the said house; it prevented the direct rays of the sun falling on the said hall-door and certain of the south windows, and also on a large portion of the garden of the said *F. Neale*; it prevented or interfered with the due cultivation and growth of flowers and shrubs in a portion of the said garden; and, in general, it seriously interfered with the amenity of the premises of the said *F. Neale*. The Plaintiff also alleged that the screen was a building within the meaning of the covenant in restraint of building contained in the lease of the 11th of November, 1878, and he claimed an injunction accordingly.

The Defendant, by his statement of defence, denied the allegations in the statement of claim. Issue was joined, and this was the trial of the action.

Neville, Q.C., and *T. H. Carson*, for the Plaintiff:—

In the first place, this screen is a "building" within the meaning and intention of the covenant against building, and it has been erected without the consent of the Plaintiff. There is no definition in the books as to what is a "building" within the meaning of such a covenant; but we submit that any structure of considerable size intended to be permanent in its character, or at least to endure for a considerable time, is a building: *Stevens* v. *Gourley* (1). Further, this screen is a nuisance or annoyance to the adjoining tenant, Mr. *Neale*. "Annoyance" is a wider term than nuisance, and means anything that interferes with the pleasurable enjoyment of a reasonable person of his property: *Tod-Heatly* v. *Benham* (2). Our evidence shews that this screen does substantially affect the light coming to the rooms on the ground floor, and, to some extent, the first floor, and also in other respects it does interfere with the comfort and enjoyment by Mr. *Neale* of his house.

Bigham, Q.C., and *O. L. Clare*, for the Defendant:—

This screen is not a building. The word "erection," although used in the covenants to paint and repair and other covenants in the lease, does not occur in the covenant in restraint of building. Only the word "building" is there used, and, when read with the context, especially the words "save and except a stable and coach-house," points to something of the same kind as a dwelling-house. The screen may be an "erection," but is not a building: *Foster* v. *Fraser* (3); *Bowes* v. *Law* (4). Neither is it an "annoyance." That word must be read with the rest of the covenant in which it occurs, and means something which, without being actually a nuisance, is an annoyance. Our evidence is clear that this trellis-screen is perforated to half its area, and does not sensibly diminish the flow of light to the windows of the adjoining house. There is no distinction on this point between this case and a claim for ancient lights. If no such interference is shewn as would give relief for an alleged obstruction of an ancient light, there is here no case of

(1) 7 C. B. (N.S.) 99.
(2) 40 Ch. D. 80.
(3) [1893] 3 Ch. 158.
(4) Law Rep. 9 Eq. 636.

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annoyance. It is a fanciful objection on the part of the Plaintiff and Mr. *Neale*, and we are entitled to prevent him from overlooking our private garden if we can do so.

Neville, in reply:—

The words "building" and "erection" are used indifferently throughout the lease, and there is substantially no distinction between them.

ROMER, J.:—

In my opinion what the Defendant has done is a breach in two respects of the covenants that are binding upon him. In the first place, although the case is somewhat on the border line, I come to the conclusion that this screen the Defendant has put up is a "building" within the meaning of the covenant which binds the lessee not, without the license and consent in writing of the "lessor parties" being first obtained, "To erect or build, or cause or permit to be erected or built upon the said piece or parcel of ground hereby appointed and demised, or upon any part thereof, any other building whatsoever save and except a stable and coach-house." This screen is a very substantial erection and a firm one. It seems to me that it is intended to be, and unless restrained, would remain, a permanent part of the wall, close to or against which it is erected. At any rate it will act in the same way, as far as the Plaintiff's house is concerned, as if it had been a wall added to a portion of the former existing wall. I think undoubtedly, if it had been built of brick, it would have been admitted to have been a breach of the covenant, and I do not think the fact that it is made of wood makes any difference under the circumstances. As I have said, it is a permanent erection, and a substantial one, and intended to act as such. I think, under the circumstances, that it is a breach of the covenant to which I have just referred. In the second place, I have no doubt whatever in my own mind, that it is a breach of the covenant that the lessee "will not do or suffer to be done on the premises, any act, matter, or thing which might be or become an annoyance to any tenant of the lessor." To my mind, undoubtedly, what the Defendant has

done is an annoyance to Mr. *Neale*, the tenant of the lessor. I think, in the first place, that it does substantially interfere with the access of light to the windows on the ground floor of this building, and that, notwithstanding some parts of the expert evidence; and I feel satisfied beyond that, and irrespective of that, that it causes an annoyance to Mr. *Neale*, the tenant, within the meaning of the words used in the covenant. It falls within the definition of the word "annoyance," in a covenant like this, which was given by the three Lords Justices in the case of *Tod-Heatly* v. *Benham* (1). In the first place, to adopt the language of Lord Justice *Cotton* (2), I am satisfied by the evidence before me that reasonable people, having regard to the ordinary use of Mr. *Neale's* house for pleasurable enjoyment, would be annoyed and aggrieved by what has been done by the Defendant. It would be an annoyance or grievance to reasonable, sensible people. It is an act which is an interference with the pleasurable enjoyment of the house. Then, to adopt the words of Lord Justice *Lindley* (3), I think it does raise an objection in the minds of reasonable men, and is an annoyance within the meaning of the covenant. Lastly, as pointed out by Lord Justice *Bowen* (4), "'Annoyance' is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house —if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort."

I have come to the conclusion, therefore, that this is a clear breach of the last-mentioned covenant as well as of the first, and on both grounds I think the Plaintiff is entitled to succeed. The simple form will be to order the Defendant to pull it down, and to pay the costs.

Solicitors for Plaintiff: *Hulberts & Hussey.*
Solicitors for Defendant: *Simpson & Cullingford.*

(1) 40 Ch. D. 80.
(2) Ibid. 94.
(3) 40 Ch. D. 96.
(4) Ibid. 98.

VAUGHAN WILLIAMS, J.

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July 20, 21, 23.

DAVIES *v.* R. BOLTON AND COMPANY.

[1893 D. 222C.]

Company—Articles of Association—Irregularities—Debenture—Valuable Consideration—Director's Authority to Seal.

Articles of association of a company empowered its directors to secure the repayment of money by debentures. The common seal of the company was not to be affixed to any document except in the presence of two directors, or of one director and the secretary, and in pursuance of a resolution of the directors. No director was to vote in respect of any contract in which he was personally interested, and if he should vote his vote was not to be counted. But one of the articles (115) provided that any debenture bearing the common seal, and issued for valuable consideration, should bind the company notwithstanding any irregularity touching the authority of the directors or officers or servants of the company to issue the same.

The company had agreed to pay *B.*, who was a director, a sum of money with interest at 6 per cent., and *B.* owed *D.* a smaller sum.

On *D.* pressing for payment it was arranged that the company should issue to *B.* a debenture for the amount owing by him to *D.*, with interest at 5 per cent., and that *B.* should transfer it to *D.* Prior to the debenture being issued *D.'s* solicitors were furnished with a print of the articles.

The debenture bore the seal of the company, which was stated to be affixed in the presence of *B.* as a director, and was signed by him and countersigned by *M.*, the secretary of the company.

No meeting of directors was called to sanction the issuing of the debenture, but there were minutes of a meeting held about the same time which stated that *B.* and *M.* were present, and that a resolution was passed authorizing the issuing and sealing of the debenture :—

Held, that the debenture was given for valuable consideration, and that the irregularities attending its issue were cured by art. 115.

A COMPANY called *R. Bolton and Company, Limited*, was incorporated on the 22nd of April, 1893, its principal object being to adopt and carry into effect an agreement also dated the 22nd of April, 1893, and made between *Reginald Bolton*, described as a merchant engineer, of the one part, and a trustee on behalf of the then intended company, of the other part.

By this agreement the company was to purchase the goodwill of *Bolton's* business as a mining engineer, and certain copyrights and other properties in connection with the business, the consideration being £1000 in cash and £7000 in fully-paid shares

in the company. The purchase was to be completed "on or before the 15th day of April, 1894," when the company was to pay the sum of £1000 cash to the vendor, or as he should direct.

Clause 6 of the agreement, however, provided that if from any cause whatever the cash payment of £1000 should not be made on or before the 20th of July then next, the company should pay interest on such sum at the rate of £6 per cent. per annum until payment of the full sum of £1000 should be made.

This business had for a time been carried on by *Bolton*, in partnership with *George Llewellyn Davies*, but the partnership only lasted about six months, when *Davies* retired on the terms of giving up a portion of the amount which he had brought into the business, the amount agreed on as being owing to him by *Bolton* being £649 1*s.* 3*d.*

The articles of association of the company were, so far as they are material to this report, as follows:—

"55. The directors may from time to time, at their discretion, raise or borrow any sum or sums of money for the purposes of the company, but so that the moneys at any one time owing shall not, without the sanction of a general meeting, exceed the nominal amount of the capital of the company.

"56. The directors may borrow or raise or secure the repayment of such moneys in such manner and upon such terms and conditions in all respects as they think fit, and in particular by mortgage of, or by the issue of debentures or debenture stock of the company, perpetual or otherwise, with or without a trust deed, charged upon all or any part of the property and rights of the company (both present and future) including its uncalled or unpaid capital for the time being.

"57. Debentures, debenture stock, and other securities may be made assignable free from any equities between the company and the person to whom the same may be issued. . . ."

"88. The number of the directors shall not be less than two nor more than seven."

"89. The first managing director shall be *Reginald Bolton*, 110, *Leadenhall Street, London, E.C.* The said *Reginald Bolton* and the remaining six subscribers to these articles shall be the first directors until such time as the latter or a majority of

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them shall nominate by an instrument in writing under their hands another director or directors to act with the said *Reginald Bolton* in place of the said remaining six subscribers."

"93. The continuing directors may act notwithstanding any vacancy in their body, but so that, if the number falls below the minimum above fixed, the directors shall not, except for the purpose of filling vacancies, act so long as the number is below the minimum."

"95. No director shall be disqualified by his office from making any contract or arrangement with the company either as vendor, purchaser, or otherwise, nor shall any such contract or arrangement, or any contract or arrangement entered into by or on behalf of the company with any other company or partnership of or in which any director shall be a member or otherwise interested be avoided, nor shall any director making such contract or arrangement, or being such member or so interested, be liable to account to the company for any profit realized by any such contract or arrangement, by reason only of such director holding that office, or of the fiduciary relations thereby established, but the nature of his interest must be disclosed by him at the meeting of the directors at which the contract or arrangement is determined on, if his interest then exists, or in any other case at the first meeting of the directors after the acquisition of his interest. Provided, nevertheless, that no director shall vote in respect of any contract in which he is so interested, and, if he do vote his vote shall not be counted, but this proviso shall not apply to the agreement mentioned [above] . . ."

"104. The directors may . . . determine the quorum necessary for the transaction of business. Until otherwise determined by the directors, one director shall be a quorum. . ."

"107. A meeting of the directors for the time being at which a quorum is present shall be competent to exercise all or any of the authorities, powers, and discretions by or under regulations of the company for the time being vested in or exercisable by the directors generally."

"110. All acts done at any meeting of the directors, or of a committee of directors, or by any person acting as a director, shall, notwithstanding that it shall afterwards be discovered that

there was some defect in the appointment of such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed and was qualified to be a director."

"115. Any mortgage, bond, debenture, trust deed, or other security bearing the common seal of the company, and issued for valuable consideration, shall be binding on the company, notwithstanding any irregularity touching the authority of the directors or officers or servants of the company to issue the same, and no person taking any such security shall be bound to ascertain that the limit prescribed by art. 55 has not been exceeded."

"118. The common seal of the company shall be deposited at the office of the company, and shall never be affixed to any document except in the presence of two directors, or of one director and the secretary, or the person acting as secretary, and in pursuance of a resolution of the directors or a committee of the directors duly authorized by the directors.

"119. Deeds, bonds, and other contracts under seal made on behalf of the company, sealed with the common seal of the company and signed by two directors, or by one director, and countersigned by the secretary, or the person acting as secretary, shall be deemed to be duly executed."

On the 29th of June, 1893, the following document was signed by *F. W. Salisbury-Jones*, *A. T. Salisbury-Jones*, *J. J. Dale*, and *A. Sulberger*, who were the majority of the "remaining six subscribers" referred to in art. 89.

"*R. Bolton & Company* (*Limited*).

"In pursuance of clause 89 of the articles of association of *R. Bolton & Company* (*Limited*), we the undersigned do hereby appoint *Gilbert Millington* . . . as director to act with *Reginald Bolton* in place of the six subscribers other than the said *Reginald Bolton*."

Millington was informed that this document was about to be signed, and said nothing; but he never consented to accept the office of director either under this document or otherwise.

In July, 1893, *Davies* and his solicitors were pressing *Bolton* for payment of the £649 1*s.* 3*d.*, and an arrangement was come

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to under which the company were to issue a debenture for that amount to *Bolton*, who was to immediately transfer it to *Davies*.

Prior to the debenture being issued the solicitors of *Davies*, at their request, were furnished with a print of the memorandum and articles of association.

On the 31st of July, 1893, a debenture was issued under the seal of the company, whereby the company covenanted to pay *Bolton*, on such day as the moneys thereby secured should become payable, the sum of £649 1*s.* 3*d.*, or such part thereof as might not already have been paid, and in the meantime to pay interest at £5 per cent. on the amount owing.

The debenture also provided that the moneys secured should become immediately payable if an order was made or an effective resolution passed for winding up the company, or if default should be made in payment of certain acceptances dated the 31st of July, 1893, granted by the company to *Bolton*, for sums amounting to £649 1*s.* 3*d.*, and payable on the dates therein mentioned.

And the company thereby charged with payment of the £649 1*s.* 3*d.*, and interest, all its present and future property, including its uncalled capital (if any) for the time being.

The debenture contained the following clause: "This debenture shall be assignable free from any equities as between the company and *R. Bolton* or any other holder thereof."

The debenture bore the seal of the company, which purported to be affixed in the presence of *Bolton* as a director, and the debenture was signed by him and countersigned by *Millington* as secretary.

On the same day three bills of exchange were drawn by *Bolton* and accepted by the company; and on the 17th of August, 1893, *Bolton* transferred the debenture to *Davies* and indorsed to him the three bills.

No meeting of directors was called or held to sanction the issue of the debenture or bills; but the minute-book contained minutes of a meeting held on the 1st of August, 1893, whereat *Bolton* and *Millington* only were present, and the following resolutions were passed:—

"Resolved that the sum of £649 1*s.* 3*d.* be paid to the vendor,

on account of the purchase of the business, by the company's bills due on the following dates: £250, due September 29th, 1893; £250, due December 24th, 1893; £149 1*s.* 3*d.*, due March 23rd, 1894.

"Resolved further, that a first mortgage debenture be issued to the vendor securing to him the payment of the above bills in the form approved and submitted by the solicitors of the company, and that the secretary be authorized to affix the company's seal thereto."

No notices calling this meeting were issued.

On the 5th of December, 1893, *Davies* commenced an action against the company for a declaration that the debenture constituted a first charge on the company's property, and to have such charge enforced by sale or otherwise.

On the 30th of January, 1894, *Davies* transferred the debenture to *Cecil Fane* absolutely.

On the 31st of January, 1894, an order was made that the company should be wound up by the Court.

By an order dated the 16th of February, 1894, liberty was given to *Fane* to carry on and prosecute the action in the same manner as *Davies* might have continued it if he had not transferred the debenture.

The Official Receiver and Liquidator, on behalf of the company, put in a defence, by paragraph 2 of which the Defendant company declined to admit that the debenture was duly or in fact issued, and alleged that it was not the deed of the company.

Pursuant to an order made by Mr. Registrar *Hood*, the company delivered particulars of the grounds for these allegations as follows:—

"The Defendants state, in paragraph 2 of the statement of defence, that the instrument referred to in . . . the amended statement of claim is not the deed of the Defendant company, because

"(*a*) The seal of the company was never affixed to such instrument, nor was the same sealed or delivered with the authority of or so as to bind the company:

"(*b*) Art. 118 of the articles of association provided as follows:

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'That the seal of the company shall never be affixed to any document except in pursuance of a resolution of the directors or a committee of the directors duly authorized by the directors.' No such resolution was ever passed:

"(*c*) No meeting of the directors was convened or held at which any such resolution could have been passed:

"(*d*) The seal of the company was affixed to the said instrument by the sole authority of *Reginald Bolton*, the person in whose favour the said instrument purported to be made. No other director of the company was present or voted in favour of the said affixing of the said seal, and no meeting of the directors had been convened for the purpose or in fact:

"(*e*) Even if a meeting of the directors had been duly convened, art. 95 of the said articles prohibited the said *Reginald Bolton* from passing any such resolution as was required by art. 118 of the said articles:

"(*f*) The moneys purported to be secured by the said instrument were not moneys which the directors had power to secure within the meaning of the articles."

The action was tried before Mr. Justice *Vaughan Williams* on the 20th and 21st of July, 1894.

Herbert Reed, Q.C., and *Eastwick*, for the Plaintiff:—

There is an existing debenture under the seal of the company, and the *onus* is on the Defendants to shew that it is invalid.

O. L. Clare, for the company and the Official Receiver and Liquidator:—

There was no valuable consideration for the debenture, and it cannot therefore be relied on as against the liquidator. If the company owed any money to *Bolton*, it was not due and payable, and the debenture was only given for his accommodation, and not for the benefit of the company.

Davies, at any rate through his solicitor if not personally, had notice of the infirmities of the debenture, for a copy of the articles was supplied to the solicitors; and *Fane*, who purchased after the action was commenced, cannot stand in a better position than *Davies*.

But want of consideration is not the only infirmity affecting the debenture. It was never sealed in the manner required by the articles. Art. 118 requires the presence and signatures of two directors or one director and the secretary. *Millington* was not a director, and therefore the only director who was present and signed the debenture was *Bolton*, the person in whose favour the debenture was given.

No valid resolution, as required by art. 118, authorizing the affixing of the seal to the debenture, was passed. Assuming one director could direct the seal to be affixed, *Bolton* was disqualified from so acting by the proviso at the end of art. 95.

The transaction was not a borrowing of money and securing repayment thereof within arts. 55, 56.

The defects in the debenture are not cured by art. 115, for that can only be prayed in aid by a *bonâ fide* purchaser for value without notice.

Herbert Reed, and *Eastwick*:—

Fane, we admit, stands in no better a position than *Davies* did. The case must be dealt with as if *Davies* were still suing.

[VAUGHAN WILLIAMS, J.:—The objection as to want of consideration is a serious one; and, if you get over that, there is a difficulty in contending that a man who takes with notice of irregularities can obtain a good title. Do you say that if *Davies*' solicitors had given attention to art. 95, they must not have been aware of irregularity?]

There was a valuable consideration. The company owed *Bolton* money, and elected to pay him in a certain way. An antecedent debt is a sufficient consideration, and if the debenture had not been given, the company would have been broken up.

In the absence of notice, a company is estopped from disputing a debenture purporting to be given for value: *In re Romford Canal Company* (1).

Any irregularities are cured by art. 115, for a perusal of the articles would not inform *Davies*' solicitor that the necessary directors had not joined in the transaction.

(1) 24 Ch. D. 85.

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1894. July 23. VAUGHAN WILLIAMS, J.:—

The question I have to decide is as to the validity of a debenture issued by the company. The case has caused me a great deal of doubt and anxiety, not so much as to this particular case, but because a question of some general and public importance is raised. The practice of insolvent traders turning themselves into limited companies and then issuing debentures in favour of some or all of the creditors of the particular trader—debentures which secure really the price payable by the company to the vendor—has of late years become extremely frequent. It is quite clear that in many cases the whole operation is a mere fraud. It involves conduct which, if it was that of an individual trader, no one would hesitate to describe as a fraud on his creditors. The Court ought not easily to permit a man, by taking the benefit of the device of turning himself into a company, to defraud his creditors. My only motive for saying this is because I am led by the practice of translating a trader into a company to scrutinize every step in such a transaction with jealousy, and to take care, if any slip is made in carrying it out, that the law shall not be strained in favour of the parties to such a transaction. I am glad, however, to say that the present case is not a bad or flagrant instance of the user of the practice referred to.

Bolton entered into a partnership with *Davies* which turned out unsatisfactorily; and *Davies* was glad to get out of it at a sacrifice. After such sacrifice had been made, there was still a considerable sum due from *Bolton* to *Davies*. After this *Bolton* turned himself into a company, not with a view to benefiting *Davies*, but rather in a spirit of hostility to him. Thereupon *Davies* put the matter into the hands of his then solicitors, who pressed *Bolton* for payment. *Bolton* was unable to pay the amount due, but said the company had to pay him for the purchase of the business, and that he anticipated that the sum would come in from the shareholders, but that if *Davies* pushed matters very far, *Bolton* might become bankrupt, and there would be a loss to the creditors. By "the creditors" I suppose that *Bolton* meant his own creditors, and perhaps also those of the company. It was suggested that *Davies* should take security from *Bolton*, and that, as the company owed money to *Bolton* for

the purchase of the business, by instalments not yet payable, the company might give a debenture to *Bolton*, who would transfer it to *Davies*. That was agreed to, and during the negotiations the solicitors of *Davies* wrote to *Bolton*, and got him to send the company's memorandum and articles of association, apparently with a view to seeing whether the debenture could be validly given by the company. The debenture in question in the present action was given, and it is my duty to consider the various objections which have been raised to it.

The first objection taken was (*a*) that the seal of the company was never affixed to such instrument, nor was the same sealed or delivered with the authority of or so as to bind the company. I am of opinion that the seal was affixed to the debenture so as to bind the company. *Bolton* was a director, and was the beginning, the middle, and the end of the company. But it seems to me that this debenture was sealed in the presence of *Millington*, the secretary of the company, and of *Bolton*, and was then handed to some one acting on *Davies*' behalf.

The second objection was (*b*) that no resolution authorizing the affixing of the seal to the debenture was ever passed so as to comply with clause 118 of the articles of association.

On the facts it was plain that there was a meeting of *Bolton* and the secretary, and that all that was done was done by the two of them. It is said that this was not enough to satisfy the requirements of art. 95, which provides, amongst other things, that no director shall vote in respect of any contract in which he is interested, and that if he does so vote his vote shall not be counted. In my judgment, the only director present was *Bolton*. It was suggested that *Millington* was also a director, but I do not think he was. He was one of the signatories of the memorandum and articles of association, and art. 89 provides that *Bolton* and the remaining six subscribers to the articles shall be the first directors until such time as the latter, or a majority of them, shall nominate by an instrument in writing under their hands another director or directors to act with *Bolton* in place of the remaining six subscribers. A memorandum in writing was signed by the majority of the subscribers and purported to appoint *Millington* as director to act with *Bolton* in place of the

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six subscribers other than *Bolton*; but *Millington* never signed this memorandum or consented to act as a director under it or otherwise. I therefore doubt whether there was a compliance with the articles, because such articles required the presence not only of *Millington*, but of another director who was not interested in the contract. But, assuming that the presence of *Bolton* was not a compliance with art. 95, I think that art. 115 applies so as to cure the irregularity.

Indeed, all the objections (*b*) to (*f*) in the Defendants' particulars are, in my view, made in respect of matters which were mere irregularities. They relate principally to the internal management of the company's affairs, and when the Court is satisfied that the seal of the company has been affixed to the debenture in the course of business by those who had the management and control of the company, non-compliance in the manner pointed out seems to come within the terms of and to be cured by art. 115.

Then it is said that, although the debenture was so issued, it was not given for a valuable consideration because the sum to secure which it was given was not then actually due and payable by the company to *Bolton*, and, therefore, it was only given for his accommodation. I think that if there had been no other circumstances beyond the fact of the debenture having been issued for the sum due but not payable, the debenture would, nevertheless, have been issued for value. But the question does not arise for decision, because under the agreement between *Bolton* and the company 6 per cent. interest was payable by the company, whereas under the debenture only 5 per cent. interest was payable; and that change was a sufficient consideration to support the debenture.

A further point taken was that *Davies* had notice of the infirmities of the debenture, and took subject to the equities affecting it; and it has been very properly conceded that Mr. *Fane* stood in no better a position in this respect than *Davies*. *Davies* had no personal knowledge of the infirmities; but I have had some doubt whether his solicitors, who sent for the articles, had such knowledge as would affect him with notice. If there had been anything on the face of the debenture which shewed a

non-compliance with the articles, I should have considered the case not to be covered by art. 115. But the debenture was signed by *Bolton* and the secretary, and all that art. 118 required was that the seal of the company should be deposited at the office of the company "and never be affixed to any document except in the presence of two directors, or of one director and the secretary." This debenture was *ex facie* signed by one director in the presence of the secretary. It was urged that this was not sufficient because *Bolton*, being an interested party, was not a director who had authority to sign, having regard to art. 95. That is quite true; but an examination of the articles would not tell the solicitors of this defect. They could not tell whether *Millington* was a director, or, if he was not, whether there were other directors present, for art. 118 only requires the presence of directors, and the mere fact that the debenture was signed by the director in whose favour it was issued would not of itself shew that there had been a violation of the articles. The debenture must be held valid, and the Plaintiff is entitled to have it enforced.

The question of costs was reserved. The debenture included all the assets, and his Lordship said he should not make any order which would involve payment of costs by the liquidator personally unless he was satisfied that that was the ordinary practice followed by the Judges of the Chancery Division.

Solicitors for Plaintiff: *Deacon, Gibson, & Medcalf.*
Solicitors for Defendants: *Firth & Co.*

F. E.

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June 14;
July 13;
Aug. 3.

In re PERUVIAN GUANO COMPANY. *Ex parte* KEMP.

[00345 of 1894.]

*Company—Dividend—Payment out of Capital—Balance-sheet—Bonâ fide Estimate of Value—Winding-up—Discovery of Worthlessness of Assets—Validity of Resolution for Dividend—Directors' Percentage on Net Profits—Interest—*3 *&* 4 *Will.* 4, *c.* 42, *s.* 28.

Articles of association of a limited company provided that after certain sums had been paid 10 per cent. of the residue of the net profits should be paid as remuneration to the directors, and that the ultimate residue of net profits should be applied in paying such dividend on the ordinary shares, or in such other manner as (subject to the regulations) a general meeting might determine.

The balance-sheet for the half-year ending the 31st of December, 1882, shewed a net profit of £11,493; but the directors, with the approval of the company's auditor, caused a supplemental balance-sheet to be prepared in which the net profit was increased to £176,493 by transferring £165,000 from the suspense account to the profit and loss account.

At a general meeting of the company held in April, 1883, both balance-sheets were approved, and it was resolved that £135,243, treated as the residue of net profits, should be dealt with in accordance with the above-mentioned provisions of the articles.

The residue of £135,243 was not distributed prior to the voluntary winding-up of the company, which commenced in 1883.

All the creditors of the company having been paid in full, certain directors claimed to be paid their shares of the 10 per cent. of the residue of net profits.

The liquidator opposed the claim on the ground that the value of the assets had been largely over-estimated, and that the proposed distribution of the residue could not be made without a dividend being paid out of capital:—

Held, that as it was not impossible for reasonable men, at the time when the resolutions of the general meeting were passed, to take the view then taken as to the value of the assets, the claim must be allowed, but without interest.

Orton v. *Cleveland Fire Brick and Pottery Company* (1) not followed.

THE *Peruvian Guano Company, Limited*, was incorporated in July, 1876, and its capital was ultimately £900,000 in 180 shares of £5000 each, of which 165 were issued. The principal object of the company was to carry out a contract for the consignment

(1) 3 H. & C. 868.

and sale of guano, entered into between *R. Raphael & Sons* and the Government of *Peru*.

By article 28 of the articles of association the remuneration of the directors for their services was to be the percentage of the net profits prescribed by article 131; but if in any year such percentage should be insufficient to pay £500 to each director, there was to be set apart out of the funds of the company such an aggregate sum as should provide a sum of £500 a year as the remuneration of each director in the year wherein such deficiency should arise.

Article 48 provided that an ordinary meeting should be held yearly; and by article 53 three shareholders present, personally or by proxy, were to be the quorum of a general meeting for (*inter alia*) the declaration of a dividend recommended by the board of directors.

Article 78 provided that any ordinary meeting might receive, adopt, and confirm the accounts, balance-sheets, and reports of the directors and auditors respectively, and might, subject to the regulations, decide on any recommendation of the directors of or relating to any dividend.

The other articles relevant to this report were as follows:—

"129. All dividends on shares shall be declared by the general meetings.

"130. The net profits of the company shall be the sum certified to be such by the auditors.

"131. Before declaring the net profits, the board shall deduct such sums as in their judgment may be necessary to meet any claims, whether ascertained or contingent, against the company. And subject thereto, the net profits of the company shall be applied as follows, viz.:—

"(1.) To the payment of any preferential or guaranteed dividend attached to any class of shares (if any).

"(2.) To the payment of interest up to 10 per cent. on the capital of the company represented by the ordinary shares.

"(3.) Ten per cent. of the residue of the net profits shall be paid and applied as remuneration to the directors.

"(4.) The ultimate residue of the net profits shall be applied in

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payment of such dividend on the ordinary shares of the company, or in such other manner as (subject to the regulations) a general meeting may determine."

It was the company's practice to treat its financial year as ending on the 30th of June, and to hold ordinary meetings late in the calendar year, the accounts submitted to such meetings being made up for the half-year ending the 30th of June previous, and from 1878 to 1881 inclusive the directors convened extraordinary general meetings for the purpose (*inter alia*) of approving the accounts for the half, ending the 31st of December, of the current financial year.

No accounts for the half-year ending the 31st of December, 1881, were submitted, but the accounts for the half-year to the 30th of June, 1882, were approved by a general meeting held on the 29th of November, 1882.

A balance-sheet for the half-year ending the 31st of December, 1882, was prepared and certified by *R. Mackay*, the company's auditor, on the 22nd of February, 1883, and it shewed an apparent profit of £11,493 12*s.* 10*d.*

Before this balance-sheet was submitted to a general meeting, the directors caused to be prepared what was called a "supplemental balance, 31st December, 1882." This was certified by the auditor on the 31st of March, 1883. It corresponded with the general balance for the same period, except that the profit balance was increased from £11,493 12*s.* 10*d.* to £176,493 12*s.* 10*d.* This increase was effected by transferring £165,000 from the suspense account to the profit and loss account.

The auditor, on the 31st of March, 1883, wrote a letter to the directors approving the transfer of the £165,000, and the transfer was not made until after the directors had consulted with the auditor.

At this time a litigation, which had been pending in *Belgium* with Messrs. *Dreyfus Brothers & Co.*, had been decided in the company's favour, and the directors were advised, and had reason to believe, that the result of a litigation in *England* relating to the same matters would be the same.

The litigation in *Belgium* ultimately terminated adversely to the company.

At a meeting of directors held on the 4th of April, 1883, only two directors were present in person, viz., *H. Parkinson Sharp* and *George Petrie*; but the former held a proxy from Mr. *Jules Kœnigswarter*, another director. At this meeting the resolutions to be submitted to, and which were afterwards passed by, the general meeting (see below) were approved, and the directors' report, as finally settled by the auditor and printed, and also the balance-sheet and supplemental balance-sheet, both certified and signed by the auditor, and the auditor's letter of the 31st of March, 1883, were read and approved. A letter from *H. Parkinson Sharp* to his colleagues, dated the 3rd of April, 1883, was also read, and was ordered to be placed on the minutes.

In this letter the writer pointed out that the time was fast approaching when certain proposed notices to summon an extraordinary meeting to pass resolutions for the voluntary winding-up of the company ought to be issued, and he submitted for consideration the question whether it was not desirable to postpone the issue of the notices, at all events until it could be seen what turn certain pending negotiations with the Peruvian Commissioner in *England*, and certain questions then under litigation, would take. The writer said the main question to be considered was that of an arrangement with the Peruvian Government, and he stated at some length the progress and prospects of a negotiation then proceeding with the commissioner with a view to a compromise of all the claims of the Government against the *Peruvian Guano Company, Limited*. The letter then continued as follows:—

"The only other legal proceedings in which the company is involved are those by and with Messrs. *Dreyfus*, arising out of the cargoes of the ships illegally and unfairly seized and transferred by the Peruvian Government to that firm. These proceedings, in the ordinary course, might occupy a considerable time before a final decision could be arrived at; but if the negotiations with the Peruvian Goverment became effective, the company would thus obtain a transfer of all the rights of the Government to the cargoes of guano, as well as of the other interests of the Peruvian Government involved in the actions. Thus, the *Peruvian Guano Company*, assisted by the transfer of, and having acquired the

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rights of the Peruvian Government, claimed to be represented by Messrs. *Dreyfus*, it seems impossible that the latter could longer maintain the actions against the company as the agent of the Peruvian Government, because the *Peruvian Guano Company*, having become the valid owners by transfer of all rights and benefits of the Peruvian Government in the subject-matter involved in the actions, would become the principals of Messrs. *Dreyfus*, who, as agents, could no longer against the principals enforce the rights claimed in the actions. Thus, by a compromise with the Peruvian Government, all litigation in which the company is now involved might be ended."

The writer then pointed out that, should this be accomplished before the liquidation commenced, the liquidation would be simplified, and impressed on his colleagues the expediency of deferring for a short time the issue of the notices to the shareholders with a view to a voluntary winding-up. He dwelt on the inconveniences attending the winding-up of a company in the position of the *Peruvian Guano Company*, especially as regards a compromise between the liquidator and the Peruvian Government. Having stated that the situation required the serious consideration of the board, the writer concluded as follows: "It is now proposed, as you are aware, with the consent of the shareholders, counsel having so advised and the auditor having duly so certified, to pay interest at the rate of 10 per cent. upon the capital as up to the 31st of December last, and also to set aside a further sum of £135,243 12*s.* 10*d.* to profit and loss, to be dealt with and appropriated in accordance with the provisions of article 131 (sub-sects. 3 and 4) of the articles of association."

A general meeting of the shareholders of the company was held on the 11th of April, 1883. Only three shareholders—who held one share each and were also directors, viz., *H. Parkinson Sharp*, *George Petrie*, and the Hon. *T. C. Bruce*—were personally present, and they represented by proxy eleven shareholders holding 106 shares. At this meeting the following resolutions were passed:—

"1. That the directors' report, together with the balance-sheet, the profit and loss account, and supplemental balance-

sheet, as audited up to the 31st of December, 1882, now submitted to the meeting, be approved, adopted, and confirmed, and that £165,000 transferred from the suspense account to the profit and loss account, as certified by the auditor, be approved and confirmed.

"2. That, as recommended by the board, interest at the rate of 10 per cent. per annum upon the fully paid-up share capital of the company in respect of the half-year ending the 31st of December, 1882, free of income tax, be paid to the shareholders on the register this day, and that the same be paid by cheques, to be posted on the 11th of April instant.

"3. That the balance of £135,243 12*s.* 10*d.* be dealt with, appropriated, and paid in accordance with article 131 (sub-sects. 3 and 4) of the articles of association."

The 10 per cent. dividend was paid to the shareholders, but no attempt was ever made to distribute the balance of profit, or the percentage remuneration.

In December, 1882, the directors paid themselves out of the assets of the company £250 each (£1750 in all) on account of their remuneration for the then current financial year; and on the 11th of May, 1883, they paid themselves a further sum of £250 each (£1750 in all) on account of remuneration.

At an extraordinary meeting of the company, held on the 2nd of May, 1883, a resolution was passed which, at another meeting on the 21st of May, was confirmed as a special resolution for the voluntary winding-up of the company and the appointment of a liquidator.

This liquidator resigned his office in August, 1889, when *Charles Fitch Kemp* was appointed liquidator in his place.

All the claims of creditors in the winding-up were paid or satisfied.

In December, 1893, the liquidator issued an originating summons under sect. 138 of the *Companies Act*, 1862, asking that a claim of *G. Petrie* and other late directors of the company or their legal personal representatives, under article 131, to have 10 per cent. on the £135,243 12*s.* 10*d.* paid to them in respect of their remuneration, might be determined by the Court, and that the Applicant might be at liberty to distribute the assets among

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the shareholders as if the claim had not been made, or that such direction might be given with respect to the claim as the Court might think fit.

The summons was served on *Petrie*, and on the executors of *Sharp* and of *Bruce*.

There were other directors in the same position; but no claim had been brought in on behalf of them or their estates.

In his evidence in support of the summons, the Applicant stated that the apparent profit of £176,493 12*s.* 10*d.* for the half-year ending the 31st of December, 1882, stated in the supplementary balance-sheet, was merely estimated profit, at all events to the extent of the £165,000 taken from the suspense account. He stated that the balance of £1,054,429 8*s.* 5*d.* standing to the credit of that account was created by crediting the account with sums, amounting in the aggregate to £1,607,172 8*s.* 8*d.*, debited to certain accounts of the Peruvian Government, and shewing an indebtedness of that Government of the last-mentioned amount; that such alleged indebtedness had, long before the date of the supplemental balance-sheet, been disputed by the Peruvian Government, which was counter-claiming against the company for alleged breaches of the *Raphael* contract; that the claim of the company against the Government was eventually reduced to £723,181 9*s.* 6*d.* by sales of guano, and that the liquidator not only abandoned that claim, but paid £260,000 by way of compromise, and £10,000 for commissions, &c. He contended, therefore, that in order to ascertain how far, if at all, the £165,000 was profit, £993,181 9*s.* 6*d.* (viz., £723,181 9*s.* 6*d.* + £260,000 + £10,000) must be written off the £1,054,429 8*s.* 5*d.* The deduction of this sum left an apparent balance to the credit of the suspense account of £61,247 18*s.* 11*d.* only.

On the credit side of the supplemental balance-sheet there was the following item:—

"*Special Cargoes Account.*	
"Our disbursements on the 11 special cargoes illegally seized by *Dreyfus, Frères, & Cie.*	£49,531 12*s.* 2*d.*"

The liquidator stated that he had recovered from *Dreyfus*

Brothers & Co. £36,795 6*s.* 11*d.*, but that this sum was insufficient by £12,736 5*s.* 3*d.* to meet the expenses incurred by the company on account of the eleven cargoes which were the subject of litigation; and that there were other claims against the company which were settled by payment of £51,398 6*s.* 9*d.* Deducting the last-named sum from the £61,247 18*s.* 11*d.* above mentioned, the liquidator said the balance of £9849 12*s.* 2*d.* only, left standing to the credit of the suspense account, was available as profit.

This sum and the £11,493 12*s.* 10*d.* profit shewn by the original balance-sheet amounted to £21,343 5*s.*; but the liquidator said that, after deducting £12,736 5*s.* 3*d.*, cargo expenses, a profit of only £8606 19*s.* 9*d.* was shewn, and that, as the 10 per cent. dividend paid amounted to £41,250, the difference between the last two sums, viz., £32,643 0*s.* 3*d.*, was really paid out of capital.

Affidavits, which on many points were in conflict with the evidence of the liquidator, were filed on behalf of the Respondents to the summons.

The summons was adjourned into Court, and was heard before Mr. Justice *Wright* on the 14th of June and 13th of July, 1894.

Haldane, Q.C., and *C. E. E. Jenkins*, for the liquidator:—

The history of the litigation between the company and *Dreyfus Brothers & Co.* is stated in *Peruvian Guano Company* v. *Dreyfus Brothers & Co.* (1).

It is well settled that where the annual receipts do not exceed the expenditure, or there are no annual receipts, the capital cannot be applied in payment of dividends upon shares: *Verner* v. *General and Commercial Investment Trust* (2); *Flitcroft's Case* (3); *Stringer's Case* (4).

The dividend was properly payable if the balance-sheet was correct; but it is evident that such great mistakes were made in the balance-sheet that the dividend could not be paid without a payment out of capital being involved. When the true facts are ascertained, the directors are not entitled to remuneration by

(1) [1892] A. C. 166.
(2) [1894] 2 Ch. 239.
(3) 21 Ch. D. 519.
(4) Law Rep. 4 Ch. 475.

WRIGHT, J. way of percentage on a dividend improperly paid out of capital. The creditors of the company, having been paid in full, are not interested parties; but the shareholders say that the amount claimed as remuneration should be paid to them as returned capital.

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The directors exercised what was, to say the least, a very sanguine judgment, and the Court ought to prevent the money being paid as a percentage on what it knows was a dividend payable out of capital.

M. Muir Mackenzie, for *Petrie*:—

The dividend was declared *bonâ fide* after an investigation of the company's affairs, and at the time the conclusion arrived at by the directors was a reasonable one.

[He was stopped by the Court.]

Bramwell Davis, and *Stewart-Smith*, for *Sharp's* executors.

G. A. Scott, for *Bruce's* executors.

WRIGHT, J.:—

I do not think I need trouble you any further, Mr. *Mackenzie*.

The claim here for remuneration by these directors, as it seems to me, is a claim to be paid that which they have a legal title to be paid under the circumstances. There are all sorts of objections to their claim—that it is stale, that events have proved that they ought not to have recommended to the general meeting that this dividend should be declared, and that the general meeting ought not to have declared this dividend. But it seems to me, when the general meeting have in fact declared the dividend which they did declare, it follows from the terms of the articles of association that the directors then became entitled to payment of their 10 per cent. after 10 per cent. had been paid to the shareholders, and that I cannot deprive them of that unless I am able to attack the very root of the matter—that is, the resolution of the general meeting declaring this dividend.

That resolution was passed twelve years ago, and at the time

it was passed it certainly was not impossible for a reasonable man to think that the items in the suspense account which we are discussing were items possessing a considerable value. I am doubtful whether, on the present application, I could properly enter at all on the question whether the resolution of the general meeting, declaring the dividend in question, was valid. I am not asked to impeach it as a whole; but, if I am entitled to go into that question, it appears to me that the proof is not sufficient that the suspense account was of such a character that it had not then got a real and substantial value in fact, or that it was of such a character that directors could not, acting reasonably, take the view that it had a substantial value. There is nothing imaginary about it at all. The amount shewn in it exceeds a million pounds, which is made up for the most part of claims in respect of cargoes of guano which had actually existed, and at rates of payment which, according to the *Raphael* contract, the company would have been entitled to receive. The directors, acting on the report of their auditor, after consultation with their auditor, and acting quite openly in the face of the shareholders, in general meeting came to the conclusion that there was out of that claim of over a million of money a sum which they for some reason or other fixed at £165,000 which could be legitimately used, because out of the expected million of money at least that amount was expected to be saved.

At this distance of time—nearly twelve years afterwards—I find it very difficult to say that the view which they took was even a wrong one. At that time the various litigations, which in the end resulted disastrously for them, were proceeding in a manner favourable to them—they had actually obtained a judgment in *Belgium*. That was under appeal, but they were not bound to anticipate that the appeal would succeed against them. The actions in *England* involved very much the same questions, and we are told, and I see no reason to doubt it, that they were advised that the result was likely to be the same in *England* as it had been to that extent in *Belgium*.

I should come to that conclusion without very much doubt but for one circumstance, and that is the printed letter of the chairman, Mr. *Parkinson Sharp*, on which Mr. *Haldane* laid so

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much stress, and which is certainly a matter which throws considerable doubt on the action of the directors, because it is clear that in the judgment of Mr. *Parkinson Sharp*, communicated to his co-directors, and communicated to many at least of the shareholders, the claims against the Peruvian Government which form such a very large part of the million of money in the suspense account were likely to turn out the other way and to leave the company with a balance, on the whole, to pay to the Peruvian Government; but then, as it seems to me, even that letter itself shews that, in the view of Mr. *Parkinson Sharp* and of those on whose advice he acted, the settlement which they expected to accomplish with the Peruvian Government would at the same time have the effect—in what way does not very clearly appear, but still in some expected way—of entitling the company to carry on with success their litigation against *Dreyfus Brothers & Co.*; and it seems clearly to have been expected that if that were the case, the claims against that firm would yield a very large sum of money. There does not seem to have been the least suspicion on the part of anybody, at the time that letter was written, that the outcome of the whole business would be any other than such an outcome as to leave the company in a condition to return the whole of their capital to the shareholders, even after the payment of this dividend. It looks to me as if the idea throughout was this. The shareholders, many of them, were in the spring of 1883 desirous to have their capital returned and the whole affair wound up. The directors seem to have resolved that that was a proper step in the interests of the company; and, before taking actually the steps necessary for the voluntary winding-up, they seem to have thought it well in the interests of the shareholders to declare a dividend of whatever it was proper for them to divide. I see no reason to think that there was anything wrong whatever. They consulted the auditor and asked him, "How much of this suspense account do you think it proper to divide before we go into liquidation?" And the result was that they calculated they could safely take it at £165,000—whether on account of the claims against Messrs. *Dreyfus Brothers & Co.* or on account of the claims against the Government I do not know.

I am unable to interfere with the claims of the directors, and I must declare that the directors are entitled to the 10 per cent. on the £135,243; but the directors must give credit for the whole of the salary which they received for any part of the year 1882.

The question whether the directors claiming the remuneration were entitled to interest stood over for further argument.

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If there had been no winding-up, the amount payable for remuneration would have been a debt which was payable under the articles in a contract.

Written claims for interest were made on the 12th of August, 1892, and on the 28th of November, 1892, in the one case "from the date when the amount should have been paid," and in the other case "from the 11th of April, 1883."

The winding-up does not affect the claim: *Buckley* on Companies (1); *In re Herefordshire Banking Company* (2); *In re East of England Banking Company* (3); and the fact that the winding-up was voluntary is immaterial.

[He was stopped on this point.]

The interest is payable under 3 & 4 Will. 4, c. 42, s. 28, and articles 28, 130, and 131.

[WRIGHT, J.:—The interest is clearly not payable under a written instrument. There is, moreover, no evidence of any allocation of the sum to be paid to any particular director under article 28.]

An action for remuneration is maintainable under the articles: *Orton* v. *Cleveland Fire Brick and Pottery Company* (4); *Isaacs' Case* (5).

[WRIGHT, J.:—In the case last cited the articles had been acted on. The articles are not in themselves sufficient. *Orton* v. *Cleveland Fire Brick and Pottery Company* is no longer law.]

Either the sum became payable when the resolution to divide

(1) 6th Ed. p. 368.
(2) Law Rep. 4 Eq. 250.
(3) Law Rep. 4 Ch. 14.
(4) 3 H. & C. 868.
(5) [1892] 2 Ch. 158.

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it was passed, or it became payable on winding-up, because the directors' powers then ceased to be exercisable.

Bramwell Davis, for *Sharp's* executors:—

There was no written demand in this case, but I support the rest of the argument adduced on behalf of *Petrie*.

G. A. Scott, for *Bruce's* executors.

Haldane, Q.C., and *C. E. E. Jenkins*, for the liquidator:—

The Court has a complete discretion as to whether interest should be given, and where, as in this case, the assets are insufficient to pay the shareholders in full, it is not equitable to give interest.

There was no demand by the directors as a body, and there was no sum certain.

[They referred to *Hill* v. *South Staffordshire Railway Company* (1).]

WRIGHT, J.:—

It is enough, and perhaps better for me, to say simply that I do not think fit to allow the claim for interest; but I do not shrink from stating why I decline to allow the claim. I think that when the company was on the eve of being wound up, to take the sum of £165,000 from the suspense account and appropriate it as profit—to a large extent towards the remuneration of the directors themselves—was such a speculative affair that the claim of the Applicants is not so meritorious that they ought to be allowed interest.

I doubt very much whether there was any sum certain due to the directors until it was ascertained by the order recently made by me. The articles of association did not themselves make the amount payable as remuneration certain, and in my judgment it was never made a sum certain until the certificate was made under article 130, or indeed until the resolution of the directors was passed which adopted the auditor's report.

On this ground I think the claim for interest must be disallowed.

(1) Law Rep. 18 Eq. 154.

I may add that I do not mean that the claimants are to take the whole amount of the remuneration. So far as I can judge without argument, where the powers of the directors to make an allocation of the remuneration ceased, as they practically did when the company went into liquidation, it must be assumed that the remuneration was to be distributed amongst them equally. Therefore, any person who does not claim his share will not get it; but it does not follow that those who do claim will get that share.

Solicitors for the liquidator of the company: *Murray, Hutchins, Stirling, & Murray.*

Solicitors for *Petrie*: *Waterhouse, Winterbotham & Co.*

Solicitor for *Sharp's* executors: *E. F. Turner.*

Solicitor for *Bruce's* executors: *Louis Du Cane.*

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[1893 P. 1516.]

Mortmain—Corporation Debenture Stock—Charge on Rates and Revenues—Interest in Land—Mortmain Act (9 *Geo.* 2, *c.* 36), *s.* 3—*Mortmain and Charitable Uses Act*, 1888 (51 *& 52 Vict. c.* 42), *ss.* 4, 10, *sub-s. iii.*

Corporation debenture stock charged on rates and "the revenues of all landed and other property of the corporation":—

Held, not to be an "interest in land" within the *Mortmain Act* (9 Geo. 2, c. 36), s. 3, and still less so within the *Mortmain and Charitable Uses Act*, 1888, ss. 4 and 10, sub-s. iii., the additional words, "or any charge or incumbrance affecting land" in sect. 3 of the former Act, being omitted from the definition of "land" in sect. 10, sub-sect. iii., of the latter Act.

Decision of *North*, J., affirmed.

Finch v. *Squire* (1) questioned.

Attree v. *Hawe* (2) discussed.

APPEAL of the Defendant, the next of kin of the testatrix, *Hannah Pickard*, from the judgment of Mr. Justice *North* (3).

The two classes of debenture stock in question were created and issued before the passing of the *Mortmain and Charitable Uses Act*, 1888.

On the appeal the following sections of the *Leeds Improvement Act*, 1877, were referred to:—

By sect. 65 the *Leeds* Corporation were authorized to borrow, "on the following securities and for the following sums; (that is to say,) for gaswork purposes on the security of the gasworks undertaking, borough fund, and borough rate £300,000; for waterworks purposes on the security of the waterworks undertaking, borough fund, and borough rate, £250,000; for the purpose of the improvement Acts and of this Act, other than gasworks and waterworks, on the security of the improvement rate in the Acts of 1842, 1856, and 1866 authorized, and the revenue of any undertaking, lands and property of the corporation, other

(1) 10 Ves. 41. (2) 9 Ch. D. 337.
(3) [1894] 2 Ch. 88.

than the gasworks and waterworks undertaking, £300,000; and the expression 'the waterworks undertaking,' 'the gasworks undertaking,' or 'improvement undertaking,' in any mortgage relating thereto granted by the corporation after the passing of this Act, shall mean the revenue of those respective undertakings."

Sect. 67, under which the debenture stock in question was created and issued, provided that "the stock so created and issued shall be a charge upon the borough fund, borough rate, the waterworks and gasworks undertakings, and the improvement rates, and the revenues of all landed and other property vested in or belonging to the corporation respectively derived therefrom, and any other revenue which may be acquired by them, but such stock shall be distributable, transmissible, and transferable as and in other respects have the incidents of personal estate."

Sect. 82 provided that "when any land, rents, or property is or are sold, demised, or otherwise disposed of by the corporation, the same shall, in the hands of any person or body corporate to whom the same shall have been sold, and his or their heirs, executors, administrators, successors, and assigns, be absolutely free from all claims, charges, or obligations in respect of any consolidated stock granted or issued under this Act."

Sect. 88 provided that any money by the Act authorized to be raised might be raised by the creation and issue of debenture stock, "on the security of the borough fund, borough rate, the waterworks and gasworks undertakings, the improvement rate, and the revenues respectively derived therefrom, and from all landed and other property vested in or belonging to the corporation, according to the provisions of the '*Local Loans Act*, 1875.'"

Byrne, Q.C., and *H. M. Humphry*, for the Appellant:—

The question, which really arises under the *Mortmain and Charitable Uses Act*, 1888, is whether these debenture stocks are an "interest in land" within sects. 4 and 10, sub-sect. iii. "Land" in sect. 10, sub-sect. iii., has the same meaning as in sect. 3 of the old *Mortmain Act* (9 Geo. 2, c. 36), except that in the later Act the words "charge or incumbrance" are omitted; but we submit that the omission is immaterial, and that the words "interest in

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land" are sufficient to cover this case, and that the question is really the same as if it had turned on the Act of *George* II.

Sect. 67 of the *Leeds Improvement Act*, 1877, under which the stocks were created, gives the stockholders a charge on the rents of the corporation's real estate before they come into the borough fund, and the stockholders can obtain a receiver who may intercept the rents before they get into the borough fund. A mortgage of rents gives the mortgagee an interest in the land, even though he may be prevented, by the terms of his security, from taking possession of the land. The charge cannot be apportioned; and if real estate is included in it, it comes within the *Mortmain Act*: *Brook* v. *Badley* (1); *In re David* (2); *Driver* v. *Broad* (3); *In re Watts* (4); *Howse* v. *Chapman* (5). In most of the cases that will probably be cited against us the charge did not arise until the money came into the borough fund; but here the receiver can intercept the rents before they come into the fund. Whether the interest of the stockholders is direct or indirect makes no difference.

Cozens-Hardy, Q.C., and *Warrington*, for the charities:—

Attree v. *Hawe* (6), *In re Thompson* (7), and *Jervis* v. *Lawrence* (8) are distinctly in our favour. The debenture stockholders have no remedy against the land. They can only claim the rents after they have been paid. They could never become owners of the land itself. The charge mentioned in the certificate is not on "rents," but on "revenue." It is nothing more than a charge upon the undertaking of the corporation, that is, upon what they have under their control: *Gardner* v. *London, Chatham and Dover Railway Company* (9); *Re Yerbury's Estate* (10); *In re Parker* (11). It does not confer upon the holders, or upon any receiver appointed on their behalf, the right to enter upon any specific lands belonging to the corporation and take the rents. A receiver could not intercept the rents until they had gone into

(1) Law Rep. 3 Ch. 672.
(2) 43 Ch. D. 27.
(3) [1893] 1 Q. B. 539, 744.
(4) 29 Ch. D. 947.
(5) 4 Ves. 542.
(6) 9 Ch. D. 337.
(7) 45 Ch. D. 161.
(8) 22 Ch. D. 202.
(9) Law Rep. 2 Ch. 201.
(10) 62 L. T. (N.S.) 55.
(11) [1891] 1 Ch. 682.

the borough fund. *In re David* (1) is distinguishable, because in that case there was an actual assignment of a particular part of the borough tolls. Here there is no assignment of any specific property; but the certificate says that the security shall be the revenues of the corporation; and, in order to enforce his charge, the lender must go to the treasurer of the corporation. This stock is, therefore, pure personalty: *Attree* v. *Hawe* (2); *In re Thompson* (3); *Jervis* v. *Lawrence* (4). *Finch* v. *Squire* (5) must be treated as overruled by *Attree* v. *Hawe*; or, if not, it ought to be overruled as having been wrongly decided. The decision was founded upon a misapprehension of the nature of a poor-rate. A rate is in no sense equivalent to rent; it is paid towards the general expenses of a town, and it is only because the liability of a ratepayer to contribute to the general expenses is measured by his interest in real property that a rate can be said to be connected with land. *Finch* v. *Squire* proceeded upon *Knapp* v. *Williams* (6), which was a case of tolls; but that case was distinguishable, because there the receiver would have had a right to occupy the toll-house. Moreover, *Finch* v. *Squire* is not in point, because here the security is not an isolated charge upon any specified rates, but is a charge upon the entire undertaking of the corporation.

Swinfen Eady, Q.C., and *A. F. Peterson*, for the Plaintiffs, the executors of the will.

Byrne, in reply:—

Finch v. *Squire* is recognised in *Thornton* v. *Kempson* (7) and *Chandler* v. *Howell* (8). *Attree* v. *Hawe* must be read in conjunction with *Ashworth* v. *Munn* (9), which qualifies it. The cases which have decided that where a charge is upon the undertaking of a going concern it is not within the *Mortmain Act* do not apply. They would apply if this were a charge merely upon the waterworks and gasworks undertakings of the corporation;

(1) 43 Ch. D. 27.
(2) 9 Ch. D. 337.
(3) 45 Ch. D. 161.
(4) 22 Ch. D. 202.
(5) 10 Ves. 41.
(6) 4 Ves. 430, n.
(7) Kay, 592.
(8) 4 Ch. D. 651.
(9) 15 Ch. D. 363.

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but it is a misuse of the term to speak of the "general undertaking" of a municipal corporation.

LINDLEY, L.J.:—

The question which arises is whether the certificate of certain *Leeds* Corporation Debenture Stock is so framed as to confer upon the holder of it an "interest in land" within the *Mortmain and Charitable Uses Act*, 1888, which has consolidated the laws relating to mortmain and charitable trusts, and in some respects amended them. It is significant that sect. 4 of that Act omits the words "charge or incumbrance," which occur in s. 3 of 9 Geo. 2, c. 36; and the definition clause, sect. 10, sub-sect. iii., defines "land" as including "any estate and interest in land." Whether that omission was intentional or not, one need not pause to consider; but it looks as if there was some desire on the part of the Legislature to exclude from the effect of the Act of *George* II. certain classes of securities which by the decisions, at all events, have been held to be outside it, although possibly they were within the words.

However, I pass that over, and I do not make that any part of the ground of the decision at which I have arrived. But I notice it because I think it is not altogether unimportant.

What this debenture stock is must be ascertained from the terms of the certificate. The certificate is under the seal of the corporation of *Leeds*, and states that the holder is entitled to a certain sum of money bearing interest at 3½ per cent. Then upon the back of the certificate is this clause: [His Lordship read the condition indorsed on the certificate, and quoted in the former report, and continued:—]

This certificate, in form, does not purport to create any charge. It is a statement of a fact—a statement of the law applicable to such stock—that the security is so and so. There is no mortgage, in terms, of any specific property; there is no assignment of anything, and there is no charge upon anything except such a charge as is implied in the language which I have used. These certificates are a charge, but they are a charge by virtue of the section in the Act of Parliament under the authority of which they are issued.

The section of the Act of Parliament which makes them a charge is the 67th section of the *Leeds Improvement Act*, 1877. Power is given by sect. 65 of that Act to borrow certain sums of money for certain purposes. [His Lordship then read the section, and continued:—]

Then sect. 67 confers the power to issue debenture stock. The important part of the section is as follows: [His Lordship read the portion of the section above quoted, and continued:—]

That Act shews exactly what this is a charge upon; and when you read the Act which creates the charge, you look in vain for a specific mortgage or specific assignment of any particular property, or any particular rents of any particular property, or anything of the sort. It is a general charge upon what is, in substance, the property of the corporation; and it is very significant that neither in the certificate nor in the charging section is there a word about rents: it is "revenues." What is charged is, "the borough fund, borough rate, the waterworks and gasworks undertakings, and the improvement rates, and the revenues of all landed and other property." The word "revenues" is, I think, a very significant expression, and prevents the holder of this debenture from saying, "I am the assignee or mortgagee of rents, in the ordinary sense of that expression, of any particular land."

That it is not a charge upon any particular land is further shewn, I think, by sect. 82, which runs thus: [His Lordship read it, and continued:—]

That shews that it is not the intention to create a specific mortgage or specific security upon any particular parcel of land.

That being the true effect of this certificate, the question arises whether it creates such an interest in land as is within the *Mortmain Act* or the Act of 1888. When we come to look at the authorities, they are not in a very satisfactory state. But it appears to me, having looked at them with some care, that all those which are really material may be classified and brought under two heads. First of all, there is the class beginning with *Knapp* v. *Williams* (1), followed by *Finch* v. *Squire* (2), *Thornton*

(1) 4 Ves. 430, n. (2) 10 Ves. 41.

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v. *Kempson* (1), and *In re David* (2), in which the debenture mortgaged or assigned a particular portion of certain tolls and rates. In those cases the decisions are tolerably, if not quite, uniform, that securities of that class are interests in land within the meaning of the old Act of *George* II. Whether they are interests in land within the new Act of 1888 is, perhaps, a little more doubtful. I say, "a little more doubtful," because of the omission from that Act of the words "charge or incumbrance." It is unnecessary to decide that. We are asked to overrule those cases. When we find a series of decisions running down from the time of Sir *William Grant*, we should be very cautious, and very slow to overrule them. But in point of fact the question is not now of much practical importance, because the Legislature has, by the *Mortmain and Charitable Uses Act*, 1891 (54 & 55 Vict. c. 73), put this matter right; and it is quite plain that under that Act, such a security as this would not be an interest in land at all: that is obvious. But this case is not governed by that Act. This case is governed by the old law; but is not within the class which I am now considering. Therefore, as we are not bound to review that line of cases, the less we say about them the better.

The other group of cases is distinguished from that to which I have already alluded by including what may be shortly termed charges on the undertaking—charges on the income of a going corporation or going concern: whether it is a railway corporation, or whether it is a municipal corporation, for this purpose, appears to me not to be material. The substance of that class of cases is that there is no definite mortgage or assignment of any specific property, but a general charge on the income and property of the corporation. This case appears to me to fall within that group of cases, upon the true construction of this certificate, and of the Act of Parliament under the authority of which it was issued. That group may be said to start with *Attree* v. *Hawe* (3), which, notwithstanding the comments made upon it, and the qualifications put upon it, in the partnership case of *Ashworth* v. *Munn* (4), appears to me still to stand as

(1) Kay, 592.
(2) 43 Ch. D. 27.
(3) 9 Ch. D. 337.
(4) 15 Ch. D. 363.

regards what are called debenture securities, or property of that description. That case has been followed in, amongst other cases, *In re Parker* (1) and *Re Yerbury's Estate* (2), and to a certain extent also in *In re Thompson* (3) and *In re Holmes* (4). They all fall within the group which I am now considering—cases of a general charge on the revenue or income of property of a going corporation or undertaking. Well, now, the decisions in that group are uniform: they are all one way. Such charges do not involve an interest in land within the meaning of the old statute of *George* II., still less within the meaning of the present Act of 1888. I am satisfied, upon the true construction of this Act of Parliament, that this case falls within the group to which I have last alluded, and not within the group of which *In re David* (5) is the latest illustration.

Under these circumstances, I think that the decision of the learned Judge below was right, and that the appeal must be dismissed, and dismissed with costs.

LOPES, L.J.:—

This is a charge which is created under sect. 67 of the Local Act, and the certificates have been issued in accordance with that section. The words indorsed upon the certificate are these: [His Lordship read them, and continued:—]

Now it seems to me that the all-important point in this case is, What is the true construction of those words authorized by the charging section and contained in that indorsement?

It is material to observe that there is no mortgage of any specific property: there is no charge on any specific property; there is no assignment of any specific property. I should read the words indorsed in this way—that the certificate is to be a security to the holder of it in respect of all the revenue of the corporation, from whatever source derived—all the income of the corporation, from whatever source derived. It is a mortgage of the undertaking generally—a charge on the undertakings of the city of *Leeds* generally. Well, then, does it create an

(1) [1891] 1 Ch. 682.
(2) 62 L. T. (N.S.) 55.
(3) 45 Ch. D. 161.
(4) 60 L. J. (Ch.) 267.
(5) 43 Ch. D. 27.

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"interest in land" within the Act of 1888? Now I agree with what has been said by Lord Justice *Lindley*: it appears to me that at any rate it is a matter worthy of consideration that in the Act of 1888 (which governs this case) the words which have been used in the previous Act, namely, "charge or incumbrance," are omitted. I cannot but think that those words are omitted for some very good reason, for it is not merely a consolidation Act, it is "an Act to consolidate and amend." And, if that is so, that confirms the conclusion at which we have arrived.

Putting the case very shortly, and adopting the construction of this document which I have already stated, this document appears to me to be in the same position as an ordinary railway debenture, and to be governed by cases such as *In re Parker* (1), *Re Yerbury's Estate* (2), and *In re Thompson* (3).

Now, the decision of this case is not so important as it might have been had it not been for the Act of 1891, because, if it were under that Act, it is perfectly clear and beyond contest that this certificate could not have been held to be an interest in land under that Act. In my opinion, therefore, the decision of the learned Judge below was right, and this certificate ought to be considered as pure personalty.

DAVEY, L.J.:—

A great many cases have been referred to by the learned counsel who argued this case on both sides—and properly referred to—and in the course of the argument we have had an opportunity of reading through and considering the cases which have been cited.

It is a little difficult at first sight to reconcile all the cases upon this subject; but I think that there are two classes of cases into which the various decisions relating to the securities given by these great mercantile or industrial or municipal corporations fall. First, there is a class of cases in which there is, according to the true construction of the instrument, a general charge on all the revenues or fruits of an undertaking. Of this category or class of cases *Attree* v. *Hawe* (4) may be taken as the type. There are

(1) [1891] 1 Ch. 682.
(2) 62 L. T. (N.S.) 55.
(3) 45 Ch. D. 161.
(4) 9 Ch. D. 337.

subsequent cases following in the same line which it is unnecessary to enumerate. It is said that in that case Lord Justice *James* went too far in his judgment, and I think it does appear that in a subsequent case of *Ashworth* v. *Munn* (1) he corrected one or two expressions which he had used in the course of his judgment in the previous case. But his correction of those expressions does not, in my opinion, affect the decision which the Court came to in that case; and that decision, I take it, to be this, that where you have a charge on the general revenue or fruits derived from an undertaking or going concern, a charge of that description does not confer an interest in land within the meaning of what is called the *Mortmain Act*, notwithstanding that the general revenue may be wholly or partially derived from the beneficial use of land.

The second category or class of cases is where, according to the true construction of the instrument, the Court holds that it contains a charge on some specific and particular property, whether that property be the rents of land, or tolls of a particular description, or other species of property. In a case of that kind, if any of those specific subjects of the charge savour of the realty, then the Court has held that the security is within the Act. Of this category or class of cases *In re David* (2), before this Court, may be taken as a type, and other cases were cited which are to be referred to the same category.

I think that this distinction, when borne in mind, will be found to reconcile and put into their proper places the numerous decisions which have been referred to on this point. I lay aside cases like *Ashworth* v. *Munn* which have been referred to, because those do not relate to the securities of a corporation of this description; but *Ashworth* v. *Munn* related to the interest of a partner in a common-law partnership as to which different considerations arise, and I only mention that case because it was cited and some weight was attached to it in the course of the argument.

If what I have said be sound, it is apparent that the real question in this case must be the construction of the particular instrument which we have before us. Now the charge in this

(1) 15 Ch. D. 363. (2) 43 Ch. D. 27.

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case is not contained in the certificate itself. It is only what it purports to be—a certificate that the holder is entitled to so much debenture stock created under certain Acts. The charge is contained in sect. 67 and sect. 88 of the *Leeds Improvement Act*, 1877, and it is there stated that the debenture stock "shall be a charge upon the borough fund, borough rate, the waterworks and gasworks undertakings, and the improvement rates, and the revenues of all landed and other property vested in or belonging to the corporation respectively derived therefrom, and any other revenue which may be acquired by them." Well, it is obvious that those words sweep in the whole revenue of the corporation. The expression "rents of land" is not used; and, although the point made may seem a fine one, in my opinion that is an important distinction from other cases which have been cited. I think the revenue derived from their landed and other property, and from all other sources, points rather to the revenue in the hands of the corporation than to the rents payable by the tenants for the specific use of the property; and I paraphrase those words as meaning the general revenue of the corporation from every source, including their borough fund, their waterworks and gasworks undertakings, their improvement rates, their landed property and revenue of every description. Well, if that is the meaning of the words, it appears to me that, in substance, this charge is exactly equivalent to the charge which the debenture in *Gardner* v. *London, Chatham and Dover Railway Company* (1) was held to give, namely, a charge on the fruits of the going concern or undertaking; and, if so, I think we ought to give the same construction to this debenture stock as was given to the debentures in *Attree* v. *Hawe* (2), and which has been unquestioned in subsequent cases, and hold that a charge of that description, if a general charge on the fruits or revenue of the undertaking, does not confer an interest in land within the meaning of the *Mortmain Act*, although part of that revenue may be derived from the beneficial use of land. And I will add that this construction is to the same effect as the construction given to the instrument before Mr. Justice *Chitty* in the case of *Re Yerbury's Estate* (3). It is, in effect, saying

(1) Law Rep. 2 Ch. 201. (2) 9 Ch. D. 337. (3) 62 L. T. (N.S.) 55.

that, in substance—whatever the words the parties have used—this instrument is a general charge of the revenue with a perfectly useless, and worse than useless—a mischievous—enumeration of particulars. And it is also in accordance with the way in which Lord Justice *Turner* and Lord *Cairns* construed the debenture in the form in the *Companies Clauses Act* in the case of *Gardner* v. *London, Chatham and Dover Railway Company* (1). They, in substance, said this: Whatever may be the words used, it is a charge only on the fruits of the undertaking.

But Mr. *Byrne* says there is no undertaking in this case. True it is that the corporation carry on a particular undertaking, such as gasworks and waterworks; but, says he, you cannot speak of the general undertaking of a municipal corporation. But that seems to be an idle distinction. I can draw no sound distinction for this purpose between the position of a municipal corporation and that of a great railway company. The municipal corporation is a great going concern, if I may use that phrase. It is a corporation endowed by the Legislature with property the revenue derived from which it is under an obligation to use and apply for public purposes; and it is just as much within the contemplation of the Legislature that it should be a going concern for the benefit of the inhabitants of *Leeds* and the neighbourhood, as it was within the contemplation of the Legislature that the *London, Chatham and Dover Railway Company* should be a going concern for the purpose of conveying persons and goods between *Dover* and *London*.

Taking this view of this case, it is unnecessary for us to express any decided opinion upon the point which was much argued before us—whether the case of *Finch* v. *Squire* (2), before Sir *William Grant*, has or has not been overruled; or, if it has not been overruled, whether it ought now to be overruled. In the view which I have expressed of this case, I do not think that that question arises, because *Finch* v. *Squire* must be regarded as a case in the second category to which I referred—namely, that in which there was a specific charge on specific property. But, as the point has been mentioned, I will just say this—that the reasoning of Sir *William Grant* in *Finch* v. *Squire* seems to be of

(1) Law Rep. 2 Ch. 201. (2) 10 Ves. 41.

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rather a refined character, and probably *Finch* v. *Squire* (1) would not be decided as it was at the present day. On the other hand, I think it is scarcely right to say it was overruled by *Attree* v. *Hawe* (2), because, in my opinion the decision in *Attree* v. *Hawe* does not touch cases of the class represented by *Finch* v. *Squire*.

For the reasons I have expressed, I agree that this appeal ought to be dismissed.

Solicitors: *Torr, Gribble, Oddie, & Sinclair; Patersons, Snow, Bloxam, & Kinder,* agents for *Dibb & Co., Leeds; Pitman & Sons.*

G. I. F. C.

C. A. 1894 *Aug.* 6, 9.

COLLINGHAM *v.* SLOPER.

[1892 C. 2801.]

FOREIGN, AMERICAN AND GENERAL INVESTMENTS TRUST COMPANY *v.* SLOPER.

[1892 F. 280.]

FOREIGN, AMERICAN AND GENERAL INVESTMENTS TRUST COMPANY *v.* SLOPER.

[1892 F. 1320.]

Practice—Compromise—Absent Persons—Dissentient Persons—Jurisdiction to approve Compromise—Rules of Supreme Court, 1883, *Order* XVI., *r.* 9*a*.

The Court has jurisdiction under Order XVI., rule 9A, to approve a compromise between the parties to an action, and to make it binding on absent persons who have not assented to it. But the Court cannot bind absent persons who have dissented from the compromise, and if it sanctions the compromise will only do so on the terms of making provision to satisfy the full claims of the dissentient persons.

THESE three actions were brought for the administration of the trusts of a sum of money amounting to upwards of £200,000, in the hands of three persons called the *London* Commissioners, as trustees for the *Saragossa and Mediterranean Railway Company* and for the bondholders of the same company. The company was incorporated by Spanish law for the purpose of constructing

(1) 10 Ves. 41. (2) 9 Ch. D. 337.

a railway from *Saragossa* to the *Mediterranean Sea*, and of completing a through route over other systems of railway.

The funds in the hands of the Commissioners were raised by bonds forming a first charge on the company's undertaking, issued in *London* and *Paris*, and handed over to the Commissioners to be applied by them in constructing the railway, subject to payment of interest and of the bonds which were redeemable by yearly drawings.

Owing to litigation in *France* and other causes the funds had been reduced, and in the meantime the construction of the railway had been impeded by want of money. One section was partly constructed, but no works had been done in the other sections.

The Plaintiffs in *Collingham* v. *Sloper* represented a large majority of the bondholders. They claimed that the funds in the hands of the Commissioners should be applied in continuing the construction of the railway, contending that there was a fair probability that resources would be found to complete the line, and that the necessary renewals of the concession could be obtained from the Spanish Government for that purpose. The Defendants were the Commissioners, the *Saragossa Railway Company* and a construction company called the *Aragon Company*.

The Plaintiffs in the other two actions, against the same Defendants, represented a substantial but comparatively small minority of bondholders, who desired to have the funds divided between the bondholders *pro ratâ*, on the ground that the object for which they were subscribed was no longer practicable.

A large number of the bondholders were not represented in either of the actions, and had expressed no opinion upon the question at issue.

The actions were tried before Mr. Justice *North*, who was of opinion that there was no reasonable probability of resources being provided to complete the line, and that without such completion the part already constructed would be of little value. He therefore gave judgment, dated the 27th of January, 1893, declaring that the bondholders were entitled to have the funds divided between them rateably, subject to the costs of the *London* Commissioners and certain other payments, and subject

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to a sufficient part being applied in realizing the property charged for the benefit of the bondholders, including the part of the line already completed; and he directed inquiries to ascertain in what way the property could best be realized. The facts of the case were given at fuller length in the previous report (1).

Before the inquiries directed by the judgment were completed a compromise was agreed to between the parties to the actions, subject to the approval of the Court; and a petition was presented to the Court asking for its sanction to the scheme.

The assent of the bondholders not represented in the actions had not been obtained to the compromise, and a few of them had expressed their dissent from it.

Under these circumstances Mr. Justice *North*, on the 5th of April, 1894, refused to sanction the scheme of arrangement.

The *Saragossa and Mediterranean Railway Company* appealed from the judgment of the 27th of January, 1893; and the Plaintiffs in *Collingham* v. *Sloper* appealed from the order of the 5th of April, 1894.

Swinfen Eady, Q.C., and *Martelli*, for the *Saragossa and Mediterranean Railway Company*, contended that the compromise was beneficial for all parties interested. They referred to Order XVI., rule 9A (2).

Crackanthorpe, Q.C., and *Eve*, for the Plaintiffs in *Collingham* v. *Sloper*.

Moulton, Q.C., *Byrne*, Q.C., and *Macnaghten*, for the Plaintiffs in the other actions.

Cozens-Hardy, Q.C., and *Kirby*, for two of the Commissioners,

(1) [1893] 2 Ch. 96.

(2) Order XVI., rule 9A: "Where in proceedings concerning a trust a compromise is proposed and some of the persons interested in the compromise are not parties to the proceedings, but there are other persons in the same interest before the Court and assenting to the compromise, the Court or a Judge, if satisfied that the compromise will be for the benefit of the absent persons, and that to require service on such persons would cause unreasonable expense or delay, may approve the compromise and order that the same shall be binding on the absent persons, and they shall be bound accordingly, except where the order has been obtained by fraud or non-disclosure of material facts."

objected that the Court had no jurisdiction to sanction a compromise in the absence of bondholders who were not represented, and some of whom had dissented.

C. T. Mitchell, for the third Commissioner.

Macaskie; Butcher; and *G. F. Hart;* for other parties.

LINDLEY, L.J.:—

In this case, as regards the non-assenting or absent bondholders, I have no hesitation in saying that I take upon myself the responsibility of judicially declaring that, in my opinion, it is in their interest that the compromise should be carried out.

Until Order XVI., rule 9A, was passed, there was a difficulty in such cases. There was a statutory power which enabled the Court to sanction a compromise to enable majorities to bind minorities; but this case does not come within any of the Acts that confer that power. But this Order XVI., rule 9A, is very important. It does not affect dissentients. Even if there is only one, he must be dealt with. I will deal with the dissentients presently. As regards the absentees, the power of the Court has been enlarged. The rule says this:— [His Lordship read the Order, and continued]:—

That is a very valuable Order, and I certainly am prepared to act upon it in a proper case. There always was power in the Court, in a suit properly constituted, to bind the rights of some members of a class whose interests were represented by others before the Court; but the power to enforce a compromise, or to declare a compromise binding, is new. I think it is an extremely beneficial rule.

Now having heard the statements made in support of this scheme, and in opposition to it, I have not the slightest doubt that it is an extremely beneficial one to everybody. The case is shortly this. Here is a company formed for making a railway in *Spain*. The scheme is a failure and has come to a deadlock. Then men of business, and those who put money into it, naturally have to consider what is to be done. As to working out all the rights of the parties, that means simply endless litigation, and one object of this compromise is to put an end to that, and see

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if something cannot be saved out of the wreck. We have to face a difficulty, and that difficulty can only be faced by concessions being made. The theory is, that this fund over which we have jurisdiction has been subscribed for a particular purpose, and it is said it is going to be applied for some purpose other than that for which it was subscribed. You must look at it as a whole, and when you come to understand what this arrangement is, I think the objection to it is not fatal. One thing is clear, that the railway cannot be completed; no one pretends that the undertaking can go on, notwithstanding the extension of time which has been granted by the Spanish Government since Mr. Justice *North's* judgment. That leaves us with the practical question—What is best to be done? The scheme is, I think, an extremely honest one, and an extremely beneficial one. The evidence shews that if the money is to be divided, the outside is about £3 18*s.* per bond. There are a number of claims, some of which are said not to be good, against this fund. That may be, but still there are claims, and they will hamper everybody in any course which can be taken under the existing circumstances; and, if all the rights were strictly worked out, there would be endless litigation. The scheme is that those bondholders who assent shall take £2 10*s.*, and that the difference between that sum and £3 18*s.* shall be laid aside in order to meet those claims. If this is not done there will be nothing for any of the bondholders. That is the practical situation. I have no hesitation in saying that I think this is a proper scheme to be assented to, and to be made binding under the Order I have referred to.

Then there are two or three dissentients. We have no power to bind dissentients, and the only way to deal with them is to set aside for them the maximum sum which they can get. I do not myself see why they should dissent, but there may, perhaps, be reasons out of Court which we know nothing about; but, as far as I can judge in Court, I do not see myself why they should dissent. However, £600 must be set aside to answer the claims of those who do dissent, and then the Court will approve the scheme on the part of those who are absent. In form, I think the right mode of dealing with the case will be to

stay proceedings under Mr. Justice *North's* judgment with liberty to apply. Then the Court will approve the compromise.

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LOPES, L.J.:—

I am of the same opinion. This case, to my mind, is a valuable illustration of the desirability of the new rule to which reference has been made. This is a railway in *Spain*, which was proposed to be constructed from *Saragossa* to the sea. The Spanish Government made a concession, and if the line could have been carried out it would have been a line of railway of great utility; but circumstances have transpired which make it impossible for the railway to be carried out. It is admitted in this case that the line cannot be carried out under any circumstances. We have to face the difficulty which has been placed before us, and to determine what is best to be done, having regard to the interest of all parties concerned. Now, a very large number of the obligation-holders assent to this compromise. There are a certain number of dissentients—I think three—representing the amount of about 150 bonds. Under this rule we can deal with those who do not assent, providing we make a compromise which is in their interest, and I have not the slightest hesitation in saying that I think the terms proposed are in the interest of the absentees. I feel quite certain, from what I have heard of the case, that, if I were one of the bondholders, I should readily assent to take the £2 10*s.* in cash. It is clear, to my mind, that the compromise is for the benefit of the absentees. Under this rule, however, we have no power to bind dissentients, and it has been agreed that the sum of £600, which means a sum of £1 per bond, shall be set aside for them; that being the maximum which, in any circumstances, they can possibly claim. I am clearly of opinion, therefore, that the compromise ought to be approved.

I am authorized by Lord Justice *Kay* to say that he entirely concurs in the view that we take of this case.

Solicitors: *Huxham & Rawlinson; Slaughter & May; Norton, Rose, Norton & Co.; Wilkins, Blyth & Co.; Francis & Johnson; Bompas, Bischoff & Co.*

M. W.

VAUGHAN WILLIAMS, J.

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April 25; *July* 18; *Aug.* 9.

In re BANK OF SOUTH AUSTRALIA.

[00111 of 1894.]

Company—Winding-up—Petition for Supervision Order—Debt incurred after Voluntary Winding-up—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 147.

A creditor cannot obtain an order to continue a voluntary winding-up under the supervision of the Court unless he possesses all the qualifications required of a creditor petitioning for a compulsory winding-up order.

Therefore, a debt incurred by a company under an agreement entered into after it has gone into voluntary liquidation is no ground for a petition for a supervision order, although the voluntary liquidation and the agreement formed parts of one scheme.

THE *South Australian Banking Company* was incorporated and continued under certain Royal Charters granted in 1847 and 1866, and this company in December, 1884, in pursuance of the power given to it to do so by the *Bank of South Australia Act*, 1884 (47 & 48 Vict. c. clxxviii.), caused itself to be registered as a limited company, by the name of "the *Bank of South Australia, Limited*," under the *Companies Acts*, 1862 to 1880. Its registered office was in *Lombard Street*, in the City of *London*.

By the original charter, in the event of the charter being revoked on the ground of the bank having failed to perform its provisions, the proprietors for the time being of the capital of the bank were to be liable to be called on to contribute to the payment of the debts and liabilities of the bank to the extent of twice the amount of their subscribed shares. And by sect. 7 of the Act notwithstanding anything in the *Companies Acts*, 1862 to 1880, the liability of the shareholders after the bank was registered should (subject to a provision as to notes issued by them) "continue to be in accordance with the limited liability defined by the said original charter as amended by the said supplemental charter, that is to say, the extent thereof shall be twice the amount of the subscribed shares as in the said charter mentioned."

In the beginning of the year 1892 negotiations were entered into for the taking over by the *Union Bank of Australia, Limited*,

of the assets and business of the *Bank of South Australia*, and an agreement was prepared containing the terms upon which it was proposed that the assets and business should be taken over.

By special resolutions of the *Bank of South Australia*, passed and confirmed at general meetings held in March and April, 1892, it was amongst other things resolved that this bank should be wound up voluntarily, and that three persons named should be appointed liquidators for the purpose of such winding-up, and that the liquidators should be authorized to enter into the agreement with the *Union Bank*.

By this agreement, which was dated the 11th of April, 1892, and to which both banks and the liquidators were parties, it was agreed that the *Bank of South Australia* and its liquidators should transfer, and the *Union Bank* should take over (with certain exceptions) all and singular the lands, buildings, goods, chattels, moneys, credits, debts, bills, notes, and things in action of the transferring bank, and the undertaking, business, and goodwill thereof, and all other its real and personal property, subject to the charges or incumbrances affecting the same.

As the consideration for such transfer, the *Union Bank* were to undertake, pay, satisfy and discharge all the debts, liabilities, and obligations of the other bank, perform its contracts, and keep it indemnified.

The agreement also provided (clause 8) that if the aggregate amount of the value of the assets, to be ascertained as therein mentioned, should be less than the aggregate amount of debts and liabilities and of the moneys paid by the *Union Bank* in respect of the liquidation, the *Union Bank* should out of certain proceeds of realization retain the amount of the deficiency, with interest; and in case such proceeds should be insufficient to pay the amount of such deficiency and interest, the amount should be and be "deemed and treated as being a debt" due by the transferring bank to the *Union Bank*.

Clause 14 of the agreement provided that if the assets in the hands of the liquidators should not be sufficient to pay and discharge "any debt due and payable to the *Union Bank* under these presents, the liquidators . . . . shall, so far as they legally can or may, make such a call or such calls upon the contributories

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of the South Australian bank as may be necessary to raise the amount required to pay and discharge such debt or liability."

On the 11th of April, 1894, the *Union Bank* presented a petition in which they alleged the facts shortly stated above, and also stated that under the agreement they had paid debts and liabilities of the *Bank of South Australia*, which were legally enforceable against it as at the date of the said agreement, to the amount of £3,000,000, and that it had been ascertained and was admitted that under such agreement a sum of £250,000 and upwards was then due and owing by the *Bank of South Australia* to the Petitioners.

The Petitioners also stated that they had required the liquidators to pay them that amount, and if necessary make a call or calls for the purpose; but that the liquidators had paid nothing on account, and had declined to make any call on the grounds, (1.) that no liability on the part of the shareholders remained beyond the original amount per share after registration under the *Companies Acts* (which had been all fully paid), and (2.) that the agreement could not be relied upon as legally justifying the making of a call for any debt newly created by the agreement.

And the Petitioners therefore asked that the voluntary winding-up might be continued under the supervision of the Court.

Finlay, Q.C., *Beale*, Q.C., and *S. Dickinson*, for the Petitioners:—

The event contemplated by clause 8 of the agreement has happened, and under this clause a large sum is admittedly due from the Respondents to the Petitioners.

[VAUGHAN WILLIAMS, J.:—Then at the date of the agreement it was a contingent debt?]

Yes. The agreement provides, by clause 14, that such debt shall be raised, if possible, by means of a call on the shareholders of the respondent company.

The liquidators say that it is a question of law whether the call can be made. Only liquidators and contributories can apply to the Court to determine questions arising in a voluntary winding-up: *Companies Act*, 1862, s. 138. The liquidators might have the question decided on an application under that section;

but as they do not avail themselves of it, and the Petitioners, as creditors, are not entitled to make an application under it, the Petitioners ask for a supervision order, so that, as creditors, they may themselves apply to the Court, under sect. 147, to decide whether the call should be made.

[VAUGHAN WILLIAMS, J.:—When the company went into voluntary liquidation no debt was due from it to the *Union Bank*. Has clause 8 of the agreement the effect of making you creditors?]

A company may go on contracting debts although it is in voluntary liquidation.

[VAUGHAN WILLIAMS, J.:—Certainly; but that is not the present case. When the liquidation commenced the right to sue in respect of the debts was in some one else.]

The effect of the agreement is to subrogate the Petitioners as creditors in the place of the creditors existing at the commencement of the voluntary liquidation, to the extent to which the assets did not satisfy their debts. The Petitioners stand in the shoes of the former creditors: *Cunliffe Brooks & Co.* v. *Blackburn and District Benefit Building Society* (1); *Baroness Wenlock* v. *River Dee Company* (2).

[VAUGHAN WILLIAMS, J.:—I am not sure that your position gives you a right to petition against the bank. The persons who had the legal right to sue have never been parties to any agreement by which they have relinquished their rights.]

When a petition for winding-up was presented by the holder of debentures payable to bearer, the objection was taken that the legal debt had not passed to the petitioner, but a winding-up order was made: *In re Olathe Silver Mining Company* (3). A creditor in equity may petition: *Buckley* on Companies (4). Sects. 147 and 148 of the Act of 1862 do not require that a petition for a supervision order should be presented by a creditor.

[They also referred to *Stone* v. *City and County Bank* (5).]

[VAUGHAN WILLIAMS, J.:—It seems to me that a person is

(1) 9 App. Cas. 857.
(2) 10 App. Cas. 354.
(3) 27 Ch. D. 278.
(4) 6th Ed. p. 223.
(5) 3 C. P. D. 282.

VAUGHAN WILLIAMS, J.

1894

In re BANK OF SOUTH AUSTRALIA.

not in a position to apply for a supervision order unless he is entitled to petition for a compulsory winding-up order.]

Where the debt is admitted there is power to make the order. The agreement may be looked at to see whether there is a new debt, or an old debt with a new creditor.

Ingle Joyce, for the Respondent company and the liquidators thereof:—

The liquidators are anxious to do their duty, but do not admit that there is a debt to be paid upon which a call can be made. A serious question of law is involved, and it has been thought this might be decided on an application in a winding-up under supervision.

[VAUGHAN WILLIAMS, J.:—If the liquidators will ask for a supervision order I will make one. Then they can ask the Court for directions as to making a call. My only doubt was as to the *locus standi* of the Petitioners.]

If an order were made the Petitioners would still have to come in and prove their debt.

[VAUGHAN WILLIAMS, J.:—That is so, although they may have been successful petitioners; but if it is manifest that these Petitioners will not be able to prove, I ought not to make any order upon their petition. I do not think the Petitioners would have any right of proof.]

The liquidators desire that the shareholders, upon whom the burthen of contest falls, should be represented; but I cannot consent to a supervision order without instructions. The liquidators might object to giving an assent, as facilitating the recovery by the Petitioners of what they claim (1).

1894. Aug. 9. VAUGHAN WILLIAMS, J.:—

I have considered this case, and I am perfectly clear that a petitioner presenting a petition like this requires all the qualifications required of a petitioner for a compulsory order. That

(1) The case stood over twice during the argument, but no application by the liquidators for, or consent by them to, a supervision order was made or given.

seems to have been decided by Sir *George Jessel*, M.R., in *In re Pen-y-Van Colliery Company* (1). That being so, I have to consider whether the *Union Bank* are in such a position that they can petition as creditors.

In my judgment, whether the *Bank of South Australia* is treated as a solvent company and the Petitioners as creditors within sect. 158 of the *Companies Act*, 1862, or the bank is treated as an insolvent company, in which case sect. 10 of the *Judicature Act*, 1875, would be applicable, in neither case is any debt which arises under the agreement of the 11th of April, 1892—which was an agreement made with the liquidators, and therefore *ex facie* an agreement entered into after the liquidation had commenced—a sufficient debt to support the petition.

In my judgment, the Petitioners have no *locus standi* to petition, because there is not a debt which is provable under the liquidation at all. The petition will be dismissed, but without costs.

My own view is that the liquidators ought to make this application. They seem to have been advised—upon very distinct grounds—that a call cannot be properly made. Under these circumstances, the real intention here is to ascertain whether the liquidators can properly make the call, and if the liquidators would only ask—as they undoubtedly might—for a supervision order, the question could be determined immediately. I do not understand why they do not apply.

Solicitors for Petitioners: *Murray, Hutchins, Stirling, & Murray.*

Solicitors for *Bank of South Australia* and its liquidators: *Hollams, Sons, Coward, & Hawksley.*

(1) 6 Ch. D. 477, 480.

F. E.

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BANKRUPTCY—*Annulment of Adjudication with consent of Creditors—Purchase of Debts of Creditors—Secret Agreement with one Creditor—Validity—Fraud on Bankrupt Law.*] A bankrupt, desiring to obtain the annulment of his bankruptcy, induced some of his creditors to sell their debts to two trustees, who were provided

BANKRUPTCY—*continued.*
with funds for the purpose, and who were as assignees of the debts to consent to the annulment. The trustees obtained assignments of the several debts on various terms, including an assignment of a debt of £25,000 in consideration of £2000 paid by them to the creditor. This assignment was made in pursuance of an agreement between the creditor and the bankrupt, whereby the bankrupt agreed to pay to the creditor a further sum of £6000 at a future time. The bankruptcy was annulled on the petition of the bankrupt, with the consent of the creditors or their assignees. The agreement to pay the £6000 was not disclosed to the Court or to the other creditors:—*Held*, that there was no duty to disclose the agreement to the Court, inasmuch as the function of the Court was merely to ascertain whether the proper parties consented; nor to the other creditors, inasmuch as there was no common basis of consent, and that the agreement was valid.—Decision of North, J., reversed. *In re* MCHENRY. MCDERMOTT *v.* BOYD. LEVITA'S CLAIM - - - - - - **C. A. 365**

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BUILDING SOCIETY—*Power to lend on First Mortgage — Part Payment of Mortgage Moneys by Third Person—Postponement of Security for Balance — Ultrà vires — Subrogation.*] H., a member of a building society which could only lend on first mortgages, but could release part of a mortgaged property if satisfied that the remainder would be a sufficient security, borrowed £17,000 from the society on a first mortgage.—

BUILDING SOCIETY—*continued.*
The society, having exhausted its borrowing powers, applied for a loan from B., who lent £6000 to H. on security of the property mortgaged to the society, which joined in the security to postpone their own mortgage. The £6000 was at once handed to the society by H., who was credited with the amount in part discharge of the £17,000:—*Held*, (1.) that the transaction with B. was *ultrà vires* the society; (2.) that B.'s security for £6000 was postponed to the society's security for £11,000; and (3.) that B. was not entitled to a security, as against the society, in respect of any part of the £6000 applied in payment of any debts and liabilities properly payable by the society. PORTSEA ISLAND BUILDING SOCIETY *v.* BARCLAY - - - 86

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CHARITY — *Endowment — Consent of Charity Commissioners — Voluntary Subscriptions—Investment in Land — Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *ss.* 62, 66—*Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 80—*Costs—Adverse Litigation.*] A charitable corporation, which was partly supported by voluntary subscriptions and partly by the income of endowments, invested a fund, derived from voluntary contributions towards the general purposes of the charity, in the purchase of land. They afterwards sold part of the land to a railway company. The Charity Commissioners claimed that the purchase-money should not be paid to the corporation without the consent of the commissioners:—*Held*, on the construction of sects. 62 and 66 of the Charitable Trusts Act, 1853, (1.) that income of any endowment means primâ facie the income of any invested funds, whether such funds be held upon any special trust or for the general purposes of the charity; (2.) but that in the case of a charity partly maintained by voluntary subscriptions and partly by the income of any endowment, bequests and donations for the general purposes of the charity which may be lawfully applied as income consistently with the terms of the gift are exempt from the jurisdiction of the Charity Commissioners; and (3.) that such gifts and the income thereof are not brought within the jurisdiction of the commissioners by being invested by the governing body. The claim of the Charity Commissioners was accordingly rejected, and the fund in Court ordered to be paid to the corporation.—The decision of Kekewich, J., affirmed.—*Governors of the Charity for the Relief of Poor Widows and Children of Clergymen* v. *Sutton* (27 Beav. 651) considered.—*Held* also, by Kekewich, J., that the claim of the Charity Commissioners was not adverse litigation within the meaning of sect. 80 of the Lands Clauses Act, 1845, and that the railway company must pay the costs of the application. *In re* Clergy Orphan Corporation - - - - C. A. 145

2. —— *Will—Contingent Gift to a Volunteer Corps—Uncertainty—Perpetuity—Validity.*] A gift by will for the benefit of a volunteer corps is a charitable bequest.—A testator bequeathed an annuity of £100 to be provided to the Central London Rangers (a volunteer corps) on the appointment of the next lieutenant-colonel:—*Held*, that the gift was void because it infringed the rule against perpetuities. *In re* Lord Stratheden and Campbell. Alt *v.* Lord Stratheden and Campbell - - - - 265

3. —— *Mortmain — Corporation Debenture Stock—Charge on Rates and Revenues—Interest in Land—Mortmain Act* (9 *Geo.* 2, *c.* 36), *s.* 3—*Mortmain and Charitable Uses Act*, 1888 (51 & 52 *Vict. c.* 42), *ss.* 4, 10, *sub-s. iii.*] Corporation debenture stock charged on rates and "the revenues of all landed and other property of the corporation":—*Held*, not to be an "interest in land" within the Mortmain Act (9 Geo. 2, c. 36), s. 3, and still less so within the Mortmain and Charitable Uses Act, 1888, ss. 4 and 10, sub-s. iii., the additional words, "or any charge or incumbrance affecting land" in sect. 3 of the former Act, being omitted from the definition of "land" in sect. 10, sub-sect. iii., of the latter Act.—Decision of North, J., affirmed.—*Finch* v. *Squire* (10 Ves. 41) questioned.—*Attree* v. *Hawe* (9 Ch. D. 337) discussed. *In re* Pickard. Elmsley *v.* Mitchell [704

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COMPANY—*Articles of Association—Company Limited by Guarantee—Shares—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 7, 14.] The articles of a company limited by guarantee not having a capital divided into shares may provide for the division of the interests of the members in the undertaking of the company into transmissible shares. Malleson *v.* General Mineral Patents Syndicate, Limited - - - - 538

2. —— *Articles of Association—Irregularities—Debenture—Valuable Consideration—Director's Authority to Seal.*] Articles of association of a company empowered its directors to secure the repayment of money by debentures. The common seal of the company was not to be affixed to any document except in the presence of two directors, or of one director and the secretary, and in pursuance of a resolution of the directors. No director was to vote in respect of any contract in which he was personally interested, and if he should vote his vote was not to be counted. But one of the articles (115) provided that any debenture bearing the common seal, and issued for valuable consideration, should bind the company notwithstanding any irregularity touching the authority of the directors or officers or servants of the company to issue the same.—The company had agreed to pay B., who was a director, a sum of money with interest at 6 per cent., and B. owed D. a smaller sum.—On D. pressing for payment it was arranged that the company should issue to B. a debenture for the amount owing by him to D., with interest at 5 per cent., and that B. should transfer it to D. Prior to the debenture being issued D.'s solicitors were furnished with a print of the articles.—The debenture bore the seal of the company, which was stated to be affixed in the presence of B. as a director, and was signed by him and countersigned by M., the secretary of the company.—No meeting of directors was called to sanction the issuing of the debenture, but there were minutes of a meeting held about the same time which stated that B. and M. were present, and that a resolution was passed authorizing the issuing and sealing of the debenture:—*Held*, that the debenture was given for valuable consideration, and that the irregularities attending its issue were cured by art. 115. Davies *v.* Bolton and Company - - 678

3. —— *Debentures in Blank—Equitable Security.*] A limited company, in pursuance of a contract to issue debentures as security for a loan

COMPANY—*continued.*

sealed and delivered to the lenders debentures in blank as to the names of the obligees. In an action by a legal debenture-holder to administer the trusts of a covering deed made to secure the debentures, the lenders were allowed the benefit of the trusts pari passu with the other debenture-holders up to the amounts of their debt. *In re* QUEENSLAND LAND AND COAL COMPANY. DAVIS *v.* MARTIN - - - - - - 181

4. —— *Director—Qualification Shares—Resignation during Period allowed for Qualification—Winding-up—Contributory.*] By the articles of association of a company, (*a*) the signatories thereto were to be directors until such time as six of them should nominate another director in their place; (*b*) the qualification of a director was to be the holding £100 in shares, but he might act without acquiring his qualification; (*c*) a director was to acquire his qualification within three months from his appointment, and unless he should do so he was to be deemed to have agreed to take the shares from the company. —The six signatories, within three months of their appointment, signed a paper appointing a director in their place. Two of them never otherwise acted as directors, and never acquired their qualification shares:—*Held*, by Wright, J., that, by accepting office and acting as directors, they had agreed to take the qualification shares, and that that agreement was not destroyed by their resignation within the three months:—*Held*, by the Court of Appeal, Lindley, L.J., dissenting, that directors who resigned within the three months were under no obligation to take the qualification shares from the company. *In re* BOLTON AND COMPANY. SALISBURY-JONES AND DALE'S CASE [C. A. 356

5. —— *Dividend—Payment out of Capital—Balance-sheet—Bonâ fide Estimate of Value—Winding-up—Discovery of Worthlessness of Assets—Validity of Resolution for Dividend—Directors' Percentage on Net Profits—Interest—3 & 4 Will. 4, c. 42, s. 28.*] Articles of association of a limited company provided that after certain sums had been paid 10 per cent. of the residue of the net profits should be paid as remuneration to the directors, and that the ultimate residue of net profits should be applied in paying such dividend on the ordinary shares, or in such other manner as (subject to the regulations) a general meeting might determine.—The balance-sheet for the half-year ending the 31st of December, 1882, shewed a net profit of £11,493; but the directors, with the approval of the company's auditor, caused a supplemental balance-sheet to be prepared in which the net profit was increased to £176,493 by transferring £165,000 from the suspense account to the profit and loss account.—At a general meeting of the company held in April, 1883, both balance-sheets were approved, and it was resolved that £135,243, treated as the residue of net profits, should be dealt with in accordance with the above-mentioned provisions of the articles. —The residue of £135,243 was not distributed prior to the voluntary winding-up of the company, which commenced in 1883.—All the creditors of the company having been paid in full, certain directors claimed to be paid their shares of the

COMPANY—*continued.*

10 per cent. of the residue of net profits.—The liquidator opposed the claim on the ground that the value of the assets had been largely overestimated, and that the proposed distribution of the residue could not be made without a dividend being paid out of capital:—*Held*, that as it was not impossible for reasonable men, at the time when the resolutions of the general meeting were passed, to take the view then taken as to the value of the assets, the claim must be allowed, but without interest.—*Orton* v. *Cleveland Fire Brick and Pottery Company* (3 H. & C. 868) not followed. *In re* PERUVIAN GUANO COMPANY. *Ex parte* KEMP - - - - - 680

6. —— *General Meeting—Conduct and Power of Chairman.*] It is the duty of a chairman to preserve order, conduct proceedings regularly, and take care that the sense of the meeting is properly ascertained with regard to any question before it; but he has no power to stop or adjourn a meeting at his own will; and if he purports to do so, it is competent for the meeting to resolve to go on with the business for which it has been convened, and to appoint another chairman for that object. NATIONAL DWELLINGS SOCIETY *v.* SYKES - - - - - - 159

7. —— *Shares—Verbal Withdrawal of Application—Notice to Company—Authority of Clerk in Registered Office—Stoppage of Cheque for Application Moneys — Winding-up — Contributory — Companies Act*, 1862 (25 & 26 *Vict c.* 89), *ss.* 23, 39.] Withdrawal of an application for shares may be made orally before notice of allotment is given.—In the absence of evidence to the contrary, the Court will infer that a clerk in the registered office of a company is, during business hours, and whilst the secretary is absent, so far in charge of the office that he has authority to receive a notice so as to make it a communication to the company. *In re* BREWERY ASSETS CORPORATION. TRUMAN'S CASE - - 272

8. —— *Winding-up—Contributory—Partnership—Signature of Memorandum by one Partner—Separate Application for Shares by Firm—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 23.] D., a member of a firm, signed the memorandum of association of a company in his own name for 100 shares, which were the qualification of a director, and he was appointed one of the first directors. The firm had been acting as agents in the formation of the company, and were desirous of being appointed agents of the company. It was accordingly agreed between the directors and the firm that the firm should take 100 fully paid-up shares, and should be appointed agents of the company at a commission. The firm signed an application for the shares, and they were allotted to them and paid up by them.—The company did not call upon D. to take 100 shares in his own name, but treated the shares allotted to the firm as satisfying his signature to the memorandum, and as his qualification as a director. Nearly seven years afterwards the company was wound up, and the liquidator put D.'s name on the list of contributories for 100 shares in addition to the shares held by the firm:—*Held* (reversing the decision of Vaughan Williams, J.), that there was only one agreement for taking 100

COMPANY—*continued.*

shares, and that D.'s signature to the memorandum of association and the firm's application for shares were in performance of the same agreement; and consequently that the allotment of shares to the firm was a satisfaction of D.'s signature of the memorandum, and also of his qualification as a director. His name was therefore removed from the list of contributories. *In re* Glory Paper Mills Company. Dunster's Case - - - - - **C. A. 473**

9. —— *Winding-up—Petition for Supervision Order—Debt incurred after Voluntary Winding-up—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 147.] A creditor cannot obtain an order to continue a voluntary winding-up under the supervision of the Court unless he possesses all the qualifications required of a creditor petitioning for a compulsory winding-up order.—Therefore, a debt incurred by a company under an agreement entered into after it has gone into voluntary liquidation is no ground for a petition for a supervision order, although the voluntary liquidation and the agreement formed parts of one scheme. *In re* Bank of South Australia - - **722**

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CONTEMPT OF COURT—*Committal—Ward of Court—Proceedings in Camerâ—Publication in Newspaper—Frivolous Application for Committal—Costs.*] An injunction having been granted by North, J., restraining a man named Hueffer from holding communication with a female ward of Court, further proceedings in the matter took place before the Judge in camerâ, Hueffer being present. It was then stated that he and the ward had been secretly married several weeks previously. The further hearing was adjourned. On the afternoon of the same day there was published in the *Star* newspaper a paragraph which stated that on that day a rarely romantic story had been unrolled before North, J., who sat in private. The name of the lady was given, and it was stated that the object of the proceedings was to prevent her perpetrating matrimony with Hueffer. Allusion was then made to some books which Hueffer had written, and it was added that the proceedings might have been comparatively tame, but for the fact that it turned out that the lady had married Hueffer some three weeks ago, and that the case stood adjourned. This paragraph had been furnished to the *Star* by a contributor named Perris, a friend of Hueffer, the information having been supplied to him by Hueffer. The next day a similar paragraph appeared in a payer called *Morning*, but it was not stated that the proceedings were in private. The paragraph in *Morning* was afterwards copied into two other newspapers. The next friend of the ward moved to commit for contempt of Court the publishers of the four newspapers, Hueffer, and Perris. The publisher of *Morning* swore that he did not know that the proceedings were not in open Court. Apologies were tendered if the Court should be opinion that a contempt had been committed:—*Held*, that the publication in the *Star* was a contempt, but that it was not a serious one; and the Court, being satisfied that it was an unintentional one, held that justice would be met by ordering the publisher of the *Star* and Hueffer respectively to pay the costs of the respective motions to commit them:—But *held*, that the motions to commit Perris and the publishers of the other newspapers were vexatious and an abuse of the process of the Court, and that they must be refused with costs. *In re* Martindale - - - - - **193**

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CONTRACT—*Contract of Service—Injunction—Negative Clause—Stipulation Negative in Form but Affirmative in Substance.*] The principle of *Lumley* v. *Wagner* (1 D. M. & G. 604) ought not to be applied to an agreement which, though negative in form, is affirmative in substance.—An agreement for the employment of a manager of a business contained a clause providing that the employer would not, except in the case of misconduct or a breach of the agreement, require the manager to leave his employ. The employer gave to the manager notice purporting to determine the agreement and the service created thereby, and the manager brought an action for an injunction to restrain the employer from acting on the notice:—*Held*, that the clause above mentioned, though negative in form, was affirmative in substance, being equivalent to a stipulation by the employer that he would retain the manager in his employ, and that an injunction ought not to be granted. —*Lumley* v. *Wagner* distinguished. Davis *v.* Foreman - - - - - **654**

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COPYRIGHT—*Books*—"*Map, Chart, or Plan*"—*Pattern Sleeve—Subject-matter—Literary Merit—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 1, 2.] The Plaintiff claimed copyright in a cardboard pattern sleeve containing upon it scales, figures, and descriptive words for adapting it to sleeves of any dimensions:—*Held* (reversing the decision of Wright, J.), that it was not capable of copyright as a "map, chart, or plan" within sect. 2 of the Copyright Act, 1842 (5 & 6 Vict. c. 45):

COPYRIGHT—*continued.*
But, *Semble*, it might be the subject of a patent as an instrument or tool. HOLLINRAKE *v.* TRUSWELL - - - - - - - 420

2. —— *Books—Series of Stories in Periodical—Retention of Copyright by Author—Infringement—Right to Sue before Publication apart from Periodical—"Book"—Separate Publication—Registration—Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 3, 18, 19.] The author of a contribution to a periodical who has not parted with his copyright to the proprietor of the periodical may sue an infringer before publishing his contribution in a separate form. And where the author has registered the series of contributions to the periodical, stating as the date of first publication the date when the first part was published in the periodical, the effect of sect. 19 is that the registration protects each contribution of the series which has been subsequently so published. JOHNSON *v.* GEORGE NEWNES - 663

3. —— *Foreign Pictures — Infringement — Sketches from Tableaux Vivants representing the Pictures—Publication in Newspaper—Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *ss.* 1, 2, 4, 6—*Foreign Law—Berne Convention—International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33). *s.* 2, *sub-s.* 3—*Order in Council, November* 28, 1887.] The Plaintiff was the owner of the copyright in certain pictures first produced in Germany. These pictures had been represented on the stage of an English theatre in the form of tableaux vivants, but such representations had been held not to be infringements of the Plaintiff's copyright. The Defendants, who were the proprietors of an illustrated newspaper, published in their paper sketches of the tableaux vivants, with explanatory letterpress. The German law was less favourable to the Plaintiff than English law:—*Held* (reversing the judgment of Stirling, J.), that according to English law the sketches in the Defendants' newspaper were not copies or reproductions of the Plaintiff's picture within the meaning of sect. 1 of the Fine Arts Copyright Act, 1862, and that whether the case was considered as governed by German or English law the Plaintiff was not entitled to an injunction. *Dicks* v. *Brooks* (15 Ch. D. 22) followed. Whether the owner of the copyright in a foreign picture can maintain an action for infringement without registering his copyright in England, *Quære.* HANFSTAENGL *v.* EMPIRE PALACE. HANFSTAENGL *v.* NEWNES - - - - **C. A. 109**

CORPORATION—Rent-charge payable by—Sale
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COSTS—Action—Probate action—Liability of real estate - - - - 615
See EXECUTOR. 1.

—— Married woman—Restraint on anticipation
See HUSBAND AND WIFE. 2. [376

—— Partnership action—Debt to one of the partners—Priority - - 326
See PARTNERSHIP. 1.

—— Settled Land Act—Several tenants for life
See SETTLED LAND ACTS. 2. [439

—— Taxation—Solicitor's Remuneration
[100, 156, 238, 641
See SOLICITOR. 2, 3, 4, 5.

COVENANT—*Building Estate—Adjoining Lessees—Covenants against Building and Annoyance—Erection of Trellis Screen—Injunction.*] A lessee covenanted not to erect or build on the demised premises, without the written consent of the lessor, "any other building whatsoever" save and except a stable and coach-house; and also not to do on the demised premises any act, matter, or thing which might be an annoyance or nuisance to any tenant of the lessor. The lessee, without the lessor's consent, erected above his boundary fence an open trellis-work screen of wood about fifty-eight feet long and twelve feet high, which interfered to some extent with the light flowing to the ground-floor windows of the adjoining premises, which were held on lease from the same lessor with covenants similar to those above stated. In an action by the lessor against an assignee of the lease:—*Held*, (1.) that under the circumstances the screen was a "building" within the meaning of the covenant against building; and (2.) that it was also an "annoyance," as it interfered with the pleasurable enjoyment of the adjoining premises by the tenant thereof, and an injunction was granted accordingly. WOOD *v.* COOPER - - - - - - 671

—— For personal service—Railway company Transfer of undertaking to new company
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—— Restraint of trade - - - 25
See RESTRAINT OF TRADE.

—— To settle after-acquired property - 76
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DEATH—Without leaving male issue - 644
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DEBENTURE—Blank—Equitable security 181
See COMPANY. 3.

—— Land securities company—Deposit at Land Registry Office - - - 464
See LAND REGISTRY.

—— Irregularity of issue—Articles of association - - - - - 678
See COMPANY. 2.

DEBENTURE STOCK—Mortmain Act—Corporation—Charge on rates - - 704
See CHARITY. 3.

DEBT—Remission of—Unexecuted testamentary document - - - - 522
See EXECUTOR. 3.

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See COMPANY. 2. [678

—— Qualification - - - - 356
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—— Remuneration—Interest - - 690
See COMPANY. 5.

DISBURSEMENTS—Remuneration of solicitor—Preparation of plan - - 238
See SOLICITOR. 4.

DISSOLUTION OF PARTNERSHIP — Lunatic partner—Injunction - - 72
See PARTNERSHIP. 2.

DIVIDEND—Payment out of capital - 690
See COMPANY. 5.

DOMICIL—French will—General gift of personal estate - - - - 607
See Will. 5.

DRAINAGE EXPENSES—Owners of premises—Trustees - - - - 562
See Local Government. 1.

EASEMENT—Light and air—Unfinished house *See* Light. [659

ECCLESIASTICAL LAW—*Advowson—Right of Presentation—Turns of Patronage—Exchange of Livings—Usurpation.*] As between patrons with alternate turns of presentation to a benefice, a presentation on an exchange of livings must be reckoned as a turn; and if one patron wrongfully usurp the turn of another, the order of turns of presentation is not thereby altered, but the ousted patron (after six months) loses his turn, and cannot requite himself by usurping against the wrongdoer by way of retaliation; and on this point there is no distinction between usurpation by a total stranger, and usurpation by a person privy in, or party to the, title. *Richards* v. *Earl of Macclesfield* (7 Sim. 267) and *Birch* v. *Bishop of Litchfield* (3 Bos. & P. 444) discussed and applied. Keen *v.* Denny - - - 169

ENDOWED SCHOOL—*Charity Commissioners—Jurisdiction — "Endowed School" — "Public School"—"Educational Endowment"—Endowed Schools Act*, 1869 (32 & 33 *Vict. c.* 56), *ss.* 4, 5, 6, 8, 9, 24—*Endowed Schools Act*, 1873 (36 & 37 *Vict. c.* 87), *s.* 9—*Endowed Schools Act*, 1874 (37 & 38 *Vict. c.* 87), *s.* 6.] Property, producing an annual income of about £900, was held in trust, first, to pay thereout an annual stipend of £40 to the minister for the time being of a specified parish, and next in the maintenance of eighteen exhibitioners in the College of Christ Church, Oxford, or in any other college or colleges at Oxford, and then in the maintenance of an annual prize of £100. The eighteen exhibitioners were to be chosen from six schools—viz., four from Shrewsbury, three from Bridgnorth, four from Newport, three from Shifnal, two from Wem, and two from Donnington. If on any vacancy there should not be a properly qualified candidate from the school whence the vacancy ought to be supplied, the vacancy was to be filled by the election of a properly qualified candidate from any of the other schools. The annual prize was to be open to the competition equally of the scholars of all the six schools.—Shrewsbury School was a "public school" within the meaning of the Public Schools Act, 1868; the other five schools were "endowed schools" within the meaning of the Endowed Schools Acts:—*Held*, that the exhibitions were "educational endowments" within the meaning of the Endowed Schools Acts, and that they formed part of the endowments of the six schools respectively; but that, inasmuch as Shrewsbury School was not solely interested in the endowment, the Charity Commissioners had jurisdiction to make a scheme for the management of the whole charity, and the jurisdiction of the High Court was entirely excluded. Attorney-General *v.* Dean and Chapter of Christ Church, Oxford - - - - - - 524

ENDOWMENT—Voluntary subscriptions—Jurisdiction of Charity Commissioners 145
See Charity. 1.

EXECUTION—Equitable—Receiver—Earnings of theatre - - - - 338
See Practice. 7.

EXECUTOR — *Action — Costs—Probate Action—Order of Probate Division for Payment of Costs "out of the Estate"—Real Estate, Liability of—Administration Action — Jurisdiction.*] By the judgment in a Probate action a will, containing specific devises of real estate but no residuary devise, was established against the heir-at-law as Defendant, whose costs were ordered to be paid "out of the estate," but no order was made as to the costs of the Plaintiffs propounding the will:—*Held*, in a Chancery administration action, that "out of the estate" meant out of the personal estate only, the Probate Division having no jurisdiction to order payment of costs out of real estate; and that—the personal estate being insufficient—none of the costs of the Probate action were payable out of the real estate, whether specifically devised or undisposed of. *In re* Shaw. Bridges *v.* Shaw - - - - 615

2. —— *Administration — Conversion — Intestacy—Option to Purchase—Heir-at-Law or Legal Personal Representative.*] The principle of *Lawes* v. *Bennett* (1 Cox, 167) applies to an intestacy, even though the option to purchase is exercisable only after the death of the grantor.—*Emuss* v. *Smith* (2 De G. & Sm. 722), explained. *In re* Isaacs. Isaacs *v.* Reginall - - 506

3. —— *Administration — Debt — Evidence—Unexecuted Testamentary Document.*] A testator in a letter of instructions to an executor stated that a debt from the executor was cancelled. The letter was not communicated to the debtor during the life of the testator, nor properly executed as a will:—*Held*, that the letter was inadmissible as evidence of the cancellation of the debt, and that the debt was payable. *In re* Hyslop. Hyslop *v.* Chamberlain - - - - 522

4. —— *Administration — Locke King's Act (Amendment Act)*, 1877 (40 & 41 *Vict. c.* 34)—*Vendor's Lien—Building Agreement.*] A building agreement provided for leases with groundrents up to £180 a year; and, at the option of the lessor, for further leases on payment by her of twenty-two years' purchase of the further groundrents. She executed the option, and died before completion:—*Held*, that her devisees took the land included in the agreement subject to discharging the amount payable in respect of the further leases. *In re* Kidd. Brooman *v.* Withall - - - - - - 558

5. —— *Administration—Marshalling—Order of Administration of Assets—Specific Devises and Bequests—Charge of Debts on Real Estate—General Direction for Payment of Debts — Stock specifically bequeathed charged by Testator in his Lifetime.*] Where the general personal estate of a testator not specifically bequeathed is insufficient for payment of his debts, a specific legatee of property charged by the testator in his lifetime with the payment of a sum of money must, as between such specific legatee and other specific

EXECUTOR—*continued.*
legatees or devisees, bear the burden of the incumbrance; and a general direction in the will that the testator's debts shall be paid after his decease is not sufficient to throw any part of such burden on the specific devisees of real estate.—*In re Bate* (43 Ch. D. 600) considered. *In re* Butler. Le Bas *v.* Herbert - - - - 250

FOREIGN COPYRIGHT — Pictures — Infringement - - - - - 109
See Copyright. 3.

FOREIGN LAW—German copyright—Pictures
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FRAUD—On bankruptcy laws—Secret agreement with one creditor - - - 365
See Bankruptcy.

FRENCH WILL — General gifts of personal estate—Conversion - - 607
See Will. 5.

GUARANTEE—Company limited by - 538
See Company. 1.

HUSBAND AND WIFE — *Separate Estate — Restraint on Anticipation—Sequestration—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1—*Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *ss.* 1, 2.] An order having been made for the payment of costs by a married woman who was tenant for life of real estate, for her separate use without power of anticipation:—*Held*, that, under a sequestration to enforce payment of the costs, the sequestrators could not take rents which had accrued due after the date of the order for payment, even though the writ of sequestration was issued after those rents had become due.—*Hood Barrs* v. *Cathcart* ([1894] 2 Q. B. 559) followed.—The 2nd section of the Married Women's Property Act, 1893, by which the Court is empowered to enforce the payment of costs, payable by a married woman in proceedings instituted by herself, out of property subject to a restraint on anticipation, does not apply to an order for payment of costs made before the Act came into operation. *In re* Lumley. *Ex parte* Hood Barrs - - - - C. A. 135

2. —— *Separate Estate—Restraint on Anticipation—Unsuccessful Appeal—Costs—"Proceeding instituted"—Married Women's Property Act*, 1893 (56 & 57 *Vict. c.* 63), *s.* 2.] The words "action or proceeding instituted," in sect. 2 of the Married Women's Property Act, 1893—under which the Court may now order payment of costs out of property of a married woman which is subject to a restraint on anticipation—mean some action, or proceeding in the nature of an action, initiated by a married woman as plaintiff, and do not include any motion or step made or taken by a married woman in an action in which she is defendant.—Accordingly, where, since the Act, an appeal by a married woman, Defendant in an action, had been dismissed with costs:—*Held*, that the Court had no jurisdiction to order payment of the Plaintiff's costs of that appeal out of

HUSBAND AND WIFE—*continued.*
property of the Defendant which was subject to a restraint on anticipation. Hood Barrs *v.* Cathcart - - - - - C. A. 376

—— Settlement - - - - 76
See Settlement.

ILLEGITIMACY—Power to appoint to relations of illegitimate person - - 565
See Will. 1.

IMPLICATION—Life estate - - 603
See Will. 4.

INFANT—*Contract to take Shares in Company—Allotment—Repudiation during Infancy—Winding-up—Right to recover Money paid in respect of Shares.*] The Plaintiff, while an infant, applied for shares in a company and paid the amount due on application. The shares were duly allotted to her, and she paid the amount due on allotment. No dividends were received by her, nor did she attend any meetings of the company. Six weeks after allotment, while still under age, she repudiated the contract, and asked for repayment of the money paid by her to the company. She subsequently brought an action to recover the money. The company then went into liquidation, and the liquidator removed her name from the register of shareholders:—*Held*, that, having derived no advantage under the contract, the consideration had wholly failed, and she was entitled to prove in the winding-up for the amount paid by her in respect of the shares. Hamilton *v.* Vaughan-Sherrin Electrical Engineering Company - - - - - 589

2. —— *Maintenance — Contingent Interest — Destination of Income after First Share has Vested —Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 43.] A testator gave his residuary personalty upon trust to divide it equally between such of the children of A. living at the testator's death as should attain twenty-one. At the testator's death A. had six children, all infants. The will contained no maintenance clause. The first child who attained twenty-one claimed one-sixth of the capital, and also, until another child attained twenty-one, the income of the remaining five-sixths:—*Held*, by the Court of Appeal (affirming the decision of Chitty, J.), that the income of the remaining five-sixths did not belong to the child who had attained twenty-one, but was applicable, under the Conveyancing and Law of Property Act, 1881, s. 43, for the maintenance of the five infants.—*In re Jeffery* ([1895] 1 Ch. 671) overruled. *In re* Holford. Holford *v.* Holford - - C. A. 30

—— Partnership—Act of bankruptcy—Receiving order - - - - 607
See Bankruptcy.

INJUNCTION—Contract of service—Negative clause - - - - 654
See Contract.

—— Covenant against building - - 671
See Covenant.

—— Partner of unsound mind—Action for dissolution of partnership - - 72
See Partnership. 2.

INJUNCTION—*continued.*
—— Slander of plaintiff's goods - - 276
See LIBEL.
—— Trade Name - - - - 449
See TRADE NAME.

INTEREST—Payment of—Statute of Limitations—Liability of partners - - 429
See LIMITATIONS, STATUTE OF. 3.
—— Remuneration of directors - - 690
See COMPANY. 5.

INTERROGATORIES—Allowance by Judge—Objection to answer - - 282
See PRACTICE. 3.

INTESTACY—Conversion of real estate—Option of purchase - - - - 506
See EXECUTOR. 2.

INVESTMENT—Insufficient security—Liability of solicitor - - - - 185
See SOLICITOR. 1.

JURISDICTION—Lunacy—Person incapable of managing his affairs - - 412
See LUNATIC.

LAND REGISTRY—*Mortgage Debentures—Land Securities Company—Deposit of Securities with Registrar—Order for Redelivery—Mortgage Debenture Act*, 1865 (28 & 29 *Vict. c.* 78), *ss.* 10, 46—*Mortgage Debenture (Amendment) Act*, 1870 (33 & 34 *Vict. c.* 20), *ss.* 8, 9.] The Court has no power to order securities, which have been deposited with the Registrar of the Land Registry Office by a Land Securities Company, to be delivered up to a receiver appointed in a debentureholders' action, or to a liquidator in the winding-up of the company, unless such securities have been redeemed or sold.—The decision of Wright, J., reversed. SOMERSET *v.* LAND SECURITIES COMPANY - - - - C. A. 464

LAND SECURITIES COMPANY—Deposit of securities at land registry office - 464
See LAND REGISTRY.

LANDS CLAUSES ACT—Costs—Adverse litigation—Payment out of Court - 145
See CHARITY. 1.

LEGACY—Contingent reversionary interest—Falling into possession—Statute of Limitations - - - - 220
See LIMITATIONS, STATUTE OF. 2.

LEGATEE—Trust for benefit of—Absolute interest - - - - - 204
See WILL. 8.

LIBEL—*Slander of Goods of a Rival Trader—Injunction.*] W., a chemist, was supplied by M. with "M.'s Infants' Food," made up in bottles and labelled. W. sold it by retail, first affixing to each bottle a notice: "The public are recommended to try Dr. V.'s Prepared Food for Infants and Invalids, it being far more healthful and nutritious than any other preparation yet offered." W. was the owner of Dr. V.'s preparation. M. brought an action for an injunction to restrain W. from affixing these notices. The Plaintiff adduced medical evidence to shew that his food

LIBEL—*continued.*
was much better than Dr. V.'s, especially for infants under six months.—Romer, J., after hearing the Plaintiff's case and the evidence adduced on his behalf, dismissed the action, without calling on the Defendant or hearing his evidence, being of opinion that the Defendant's notice was a mere puff of Dr. V.'s preparation, and gave the Plaintiff no legal ground of complaint:—*Held*, on appeal, that there must be a new trial, for that, if on the whole of the evidence it appeared that the statement contained in the Defendant's notice was a false statement about the Plaintiff's goods, to the disparagement of them, and had injured or was likely to injure the Plaintiff, the action would lie. MELLIN *v.* WHITE - - - - C. A. 276

LICENSE—Patent—Revocation - - 388
See PATENT.

LIGHT—*Easement—Unfinished House—Prescription Act*, 1832 (2 & 3 *Will.* 4, *c.* 71), *ss.* 3, 4.] A right to the light and air coming to the windows of a building, which may grow into the statutory right acquired by twenty years' user and enjoyment as of right and without interruption, commences when the exterior walls of the building with the spaces for the windows are completed, and the building is properly roofed in, although the window-sashes and the glass may not be put in and the interior may not be finished until some time afterwards.—*Cortauld* v. *Legh* (Law Rep. 4 Ex. 126) followed. COLLIS *v.* LAUGHER - - - - - 659

LIMITATIONS, STATUTE OF—*Cause of Action—Debt—Security—Mortgage—Contract to Pay Difference on Realization—Postponement—Time of Accruer of Cause of Action*—(21 *Jac.* 1, *c.* 16), *s.* 3.] By a memorandum of deposit, dated in 1882, of bonds to secure the repayment in 1883 of an advance, the borrower authorized the lender to sell the bonds for the purpose of repaying the advance, and undertook to pay the lender any difference between the proceeds of the bonds and the amount of the advance. In 1889 the lender sold the bonds, but the proceeds were not sufficient to repay the whole of the advance. In 1891 the borrower died without having given any acknowledgment of the debt:—*Held* (reversing the decision of North, J.), that the cause of action in respect of the whole of the debt accrued in 1883 and not in 1889, and therefore that a claim for the difference by the lender against the estate of the borrower was barred by the Statute of Limitations. *In re* MCHENRY. MCDERMOTT v. BOYD. BARKER'S CLAIM [C. A. 290

2. —— *Legacy Charged on Contingent Reversionary Interest in Land—Falling into Possession—"Present right to receive"—Remedy by Foreclosure or Sale—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 1, 2, 8.] A testator, who died in 1854, being, under the will of his father, entitled to a contingent reversionary interest in land, devised all his real estate, including the reversionary interest, to his wife for life, and, after her decease, he charged the same with a sum of money which he bequeathed in four legacies of equal amount to his son and three

LIMITATIONS, STATUTE OF—*continued.*

daughters; and, subject thereto, he devised all his real estate and the contingent interest to his son. The widow died in 1880; and shortly after her death the whole of the testator's real estate then in actual possession was sold, and the legacies were partly paid; but no steps were taken to realize the testator's interest under his father's will previously to its falling into possession, which happened in 1893:—*Held*, that the right of the legatees to recover the balance of their legacies was barred by sect. 8 of the Real Property Limitation Act, 1874.—*Hugill* v. *Wilkinson* (38 Ch. D. 480) explained and distinguished.—A person entitled to the benefit of an equitable charge created by will upon a reversionary interest in land has no remedy by way of foreclosure, but only by way of sale or mortgage of such interest. *In re* OWEN - - 220

3. —— *Partnership — Liability of Retired Member of Firm—Payment of Interest by Continuing Members — Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 14.] W. T., a member of a firm, was jointly and severally liable in a sum of money deposited with the firm by the trustees of a will. In 1883 W. T. retired from the firm, and a deed of dissolution was executed by which it was agreed that W. T.'s retirement should not be made known for a year, and then that it should be optional whether it should be gazetted; that the continuing partners should take and collect all the assets and should pay all the debts and liabilities, and should indemnify W. T. against them, and should pay him a certain sum by instalments; and that so long as any money remained due to him he should have power on giving notice to collect the debts due to the firm and to re-enter on the premises and carry on the business himself. W. T.'s retirement was never gazetted, and the business was carried on in the old name of the firm. Down to 1891 interest was regularly paid to the testator's estate on the loan by cheques drawn in the name of the firm:—*Held*, in a suit by the beneficiaries under the will, that, as against W. T., the debt was not barred by the Statute of Limitations, notwithstanding the 14th section of the Mercantile Law Amendment Act; for that, considering the terms of the deed of dissolution and the fact that the retirement of W. T. was kept secret, the payment of interest, after his retirement, by the continuing partners, must be taken to have been made by them on his behalf and as his agents.—*Watson* v. *Woodman* (Law Rep. 20 Eq. 721) distinguished.—The decision of Romer, J., affirmed. *In re* TUCKER. TUCKER *v.* TUCKER - C. A. 429

LIS PENDENS—*Registration—Personal Estate—Assignment of Choses in Action—Book Debts—Appointment of Receiver—Judgments Act*, 1839 (2 & 3 *Vict. c.* 11), *s.* 7—*Laches.*] The doctrine of lis pendens does not apply to personal property other than chattel interests in land.—A firm of traders assigned their book debts to the Plaintiffs, who gave no notice of the assignment to the debtors. The Plaintiffs brought an action against the firm to enforce their security, which they registered as a lis pendens, and obtained an injunction and a receiver; but no notice of the action was given to the debtors. The firm then assigned the same

LIS PENDENS—*continued.*

book debts to a banking company, who gave notice of their security to the debtors. The banking company had no notice of the action or of the order for an injunction and a receiver, unless the registration of the lis pendens amounted to constructive notice:—*Held* (reversing the decision of Chitty, J.), that the banking company were not affected with notice by the registration of the lis pendens, and that their security had priority over that of the Plaintiffs.—*Semble* also, that, even if the registration had given the banking company notice of the lis pendens, the Plaintiffs would have lost their priority by their laches. WIGRAM *v.* BUCKLEY - - - - C. A. 483

LOCAL GOVERNMENT — *Drainage Expenses—Settled Lands—Capital Money—Tenant for Life—Trustee — Owner of Premises — Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *ss.* 2, 49, 90—"*Owners of Premises*" — *Will — Construction — "Repairs."*] By the will of a testator, who died in 1846, certain freehold messuages were devised to trustees, their heirs and assigns, upon trust to permit A. and B. during their joint lives, and the survivor of them during his life, to hold, occupy, and enjoy the same, and to receive and take the rents thereof, and, after the death of the survivor, upon trust for the first and other sons of B. successively in strict settlement. During the life of one of the equitable tenants for life, the trustees applied certain capital moneys held by them upon similar trusts in payment of expenses incurred for drainage works in respect of the devised messuages, which were without such sufficient drains as specified in the Public Health Act, 1848, s. 49:—*Held*, that as the trustees had the legal estate in the messuages, and were the persons entitled for the time being to receive the rack rents thereof (although in trust for the beneficiaries), they were "owners" within the definition of that term in the Public Health Act, 1848, s. 2, and had rightly paid the drainage expenses in question out of the capital moneys in their hands, but that as between the tenant for life and the remainderman the capital moneys so applied must be treated as a charge upon the messuages.—By a clause in his will the testator declared that the parties beneficially entitled to the rents and profits "of any of his houses" should keep the same in good and absolute repair:—*Held*, that these drainage works were not "repairs" within the meaning of that clause. *In re* BARNEY. HARRISON *v.* BARNEY - 562

2. —— *Expenses of Works executed under s.* 150 *of the Public Health Act*, 1875—*Commonable Lands—Rights of Turbary—Purchase of Lands by Railway Company—Allotment of Waste Lands to Lord of Manor upon Charitable Trusts—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150, 151, 257—"*Owner.*"] A claim for expenses incurred by a local authority for works executed by them under sect. 150 of the Public Health Act, 1875, may be sustained in respect of property vested under the authority of Parliament in a trustee for charitable purposes, even although the property cannot be let by reason of a special condition imposed by the Legislature. *In re* CHRISTCHURCH INCLOSURE ACT. MEYRICK *v.* ATTORNEY-GENERAL - - - - 209

LOCAL GOVERNMENT—*continued.*

3. —— *Supply of Water—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 52—*Waterworks*] A local authority may, notwithstanding sect. 52 of the Public Health Act, 1875, construct and use waterworks for the supply of water for their own use only in the district of a water company able and willing to supply such water. WEST SURREY WATER COMPANY *v.* GUARDIANS OF CHERTSEY UNION - - - - - 513

LORD OF MANOR—Right of turbary—Trust for charity—Liability for expenses of paving road - - - - - - 209
See LOCAL GOVERNMENT. 2.

LUNATIC — *Practice — Mental Infirmity — "Lunatic" — Stockholder — Dividends — Order—Receiver—Jurisdiction—Bank of England—Indemnity—Transfer into Court—Title of Order—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *ss.* 108, 116, 146, 333—*Lunacy Act*, 1891 (54 & 55 *Vict. c.* 65), *s.* 27, *sub-s.* 4—*Rules in Lunacy*, 1892.] Under sect. 116 of the Lunacy Act, 1890, the Judge or Master in Lunacy has jurisdiction to make an order appointing a receiver of dividends on stock standing in the Bank of England in the name of a person who is, "through mental infirmity arising from disease or age, incapable of managing his affairs"; and, under sects. 133 and 146, the Bank may safely act on such order; but, as it is unusual to appoint a receiver of dividends on Bank of England stock standing in the name of another person, the better course in such cases, in the absence of any special reason to the contrary, is to bring the stock into Court.—Such an order should not be intituled "In Lunacy": Form 1 (*e*), Schedule to Rules in Lunacy, 1892. *In re* BROWNE - - - - - C. A. 412

—— Partner—Injunction - - - 72
See PARTNERSHIP. 2.

MAINTENANCE—Infant—Contingent interest
See INFANT. 2. [30

MALA FIDES—Diversion of water — Indirect motive - - - - 53
See WATERWORKS.

MEETING OF SHAREHOLDERS — Power of chairman - - - - 159
See COMPANY. 6.

METROPOLIS MANAGEMENT—*Public Undertaking—Sale by Limited Owner—Application of Purchase-money — Repairs — Metropolitan Street Improvement Act* (57 *Geo.* 3, *c.* XXIX.).] Funds representing the purchase-money of part of a churchyard taken for street improvements applied in the purchase, alteration, and repair of a house for a vicarage. *Ex parte* VICAR OF ST. BOTOLPH, ALDGATE - - - - - 544

MORTGAGE — *Consolidation — Assignment of Equity of Redemption prior to Union of Mortgages.*] J. B. was the owner of two properties, A and B. In February, 1864, he mortgaged A to C. S.; and in July, 1864, he gave a second mortgage on it to W. S.—In 1863, 1865, and 1866, he mortgaged B to other mortgagees, and in 1871 and 1873 the first mortgages on both properties were transferred to R.—In 1884 J. B. mortgaged

MORTGAGE—*continued.*

both properties to the Plaintiff, and in 1885 he mortgaged both properties to P., subject to the prior incumbrances.—In July, 1890, W. S.'s second mortgage of A was transferred to P., who, in October, 1890, sold it under his power of sale to the Plaintiff, subject only to the mortgage to C. S.:—*Held* (affirming the decision of Romer, J.), that as the union of the first mortgages on the two properties in R. had not taken place until after the equity of redemption in A had been assigned to W. S., the executors of R. could not consolidate the first mortgages so as to prevent the Plaintiff from redeeming A alone.—*Vint* v. *Padget* (2 De G. & J. 611) considered. MINTER *v.* CARR - - - - - C. A. 498

—— Building Society—Part payment—Subrogation - - - - - 86
See BUILDING SOCIETY.

—— Deducing title—Solicitor's remuneration
See SOLICITOR. 5. [641

NATIONAL DEBT — Conversion — Bequest of 3 per cent. annuities - - 649
See WILL. 3.

NEWSPAPER—Contempt of Court - 193
See CONTEMPT OF COURT.

NEXT-OF-KIN—"Relations" — Construction of will - - - - - 565
See WILL. 1.

NOISE—Several persons—Nuisance - 163
See NUISANCE. 1.

NOTICE—Clerk in office of company—Notice to company - - - - 272
See COMPANY. 7.

—— Lis pendens—Action as to personal estate—Priority - - - - 483
See LIS PENDENS.

NUISANCE—*Noise—Injunction—Noise caused by the Acts of Two or More Persons.*] The acts of two or more persons may, taken together, constitute such a nuisance that the Court will restrain all from doing the acts constituting the nuisance although the annoyance occasioned by the act of any one of them if taken alone would not amount to a nuisance.—The dictum of James, L.J., in *Thorpe* v. *Brumfitt* (Law Rep. 8 Ch. 650, 656), approved of and followed. LAMBTON *v.* MELLISH. LAMBTON *v.* COX - 163

2. —— *Trees overhanging Neighbour's Ground.*] Large boughs of trees standing on L.'s land had for more than twenty years overhung W.'s land. W., without giving any notice to L., cut off the boughs to the boundary line. L. brought his action, alleging that W. had no right at all to cut off anything which had overhung his ground more than twenty years, and, that if W. was entitled to cut the branches at all, he was not entitled to do so without notice. Kekewich, J., held that W. was entitled to lop the branches, but not without notice to L., and that the cutting, therefore, was improper:—*Held*, on appeal, that W. was entitled to lop the branches which overhung his land, though they had done so for more than twenty years; that, as he did not go on L.'s

NUISANCE—*continued.*
land for the purpose, notice was not necessary; and that the action must be dismissed. LEMMON *v.* WEBB - - - - - C. A. 1

OPTION—To purchase—Conversion of real estate—Intestacy - - - - 506
See EXECUTOR. 2.

—— To purchase—Devise of land subject to—Locke King's Act - - - 558
See EXECUTOR. 4.

—— To take shares instead of dividend—Capital or income - - - 578
See TENANT FOR LIFE AND REMAINDERMAN.

ORDER IN COUNCIL, November 28, 1887 109
See COPYRIGHT. 3.

PARSONAGE—Purchase and repair of—Purchase-money of churchyard - 544
See METROPOLIS MANAGEMENT.

PARTITION—*Action—Practice—Parties—Mortgage—Dismissal as against Mortgagees.*] An action for partition was brought by the owner of the equity of redemption of an undivided share of land subject to mortgages affecting the whole, the Plaintiff's mortgagee and the overriding mortgagees being made parties. The action was dismissed against the several mortgagees as shewing no reasonable cause of action against them. SINCLAIR *v.* JAMES - - - 554

PARTNERSHIP—*Action—Costs how Payable—Debt from Partnership to one of the Partners—Priority.*] The costs of a partnership action, being costs of administration, are payable out of the assets remaining after the rights of the partners have been adjusted, and a clear amount ascertained which is divisible between them according to their respective interests in the partnership.—Where, therefore, on the further consideration of a partnership action it appeared that there was a debt owing to one partner on loan account, and a larger balance in respect of capital due to him than was due to his co-partner, the Court *held* that a fund in Court representing the partnership assets ought to be applied, first, in payment of the debt, secondly, in payment of the excess of the balance due to the one partner over the balance due to the other, and, thirdly, in payment, so far as it would extend, of the costs of the action, and that the rest of the costs should be borne by the partners in proportion to their interests in the partnership.—The decision of Kekewich, J., affirmed. ROSS *v.* WHITE [C. A. 326

2. —— *Partner of Unsound Mind—Pending Action for Dissolution—Interference with Business—Injunction—Jurisdiction.*] Where an action is pending for the dissolution of a partnership on the ground that the defendant partner is of unsound mind, the Court will grant an injunction to restrain the defendant from interfering in the conduct of the partnership affairs so as to injure the business and assets of the firm. J. *v.* S. - 72

—— Liability of retired partner—Payment of interest - - - - 429
See LIMITATIONS, STATUTE OF. 3.

PARTNERSHIP—*continued.*
—— Shares in company in name of firm—Single partner a subscriber of memorandum
See COMPANY. 8. [473

PATENT—*Exclusive License—Non-payment of Royalty—Improvements introduced by Licensee—Revocation of Licence—Injunction.*] A patentee, in consideration of a sum of money paid down and of royalties thereafter to be paid, by deed granted an exclusive license for the manufacture and sale of the patented articles manufactured according to the patent. The licensees covenanted to pay the royalties and to push the invention, and were authorized to grant sub-licenses. They had express power to revoke the license, but no such power was reserved to the patentee. Disputes arose in consequence of improvements made by the licensees in the patented invention to which the patentee objected as deviations from the patent, and the royalty was withheld; thereupon the patentee by notice in writing purported to revoke the license:—*Held*, (1.) that the license was not revocable at the will of the patentee; (2.) that there had been no such breach of the conditions contained in the deed as would justify a revocation.—Decision of Romer, J., affirmed. GUYOT *v.* THOMSON - - - C. A. 388

PATRONAGE—Right of—Exchange of livings
See ECCLESIASTICAL LAW. [169

PATTERN—Lady's sleeve - - - 420
See COPYRIGHT. 1.

PAYMENT INTO COURT—Money in hand of trustees - - - - 408
See PRACTICE. 5.

—— Order for—Admissions by defendant before action - - - - 345
See PRACTICE. 6.

PERIODICAL—Series of stories—Copyright 663
See COPYRIGHT. 2.

PERPETUITY—Trust for sale - - 381
See WILL. 6.

—— Will—Gift to volunteer corps - 265
See CHARITY. 2.

PERSONAL ESTATE—Registration of lis pendens—Notice—Priority - - - 483
See LIS PENDENS.

PLAN—Copyright—Pattern of lady's sleeve 420
See COPYRIGHT. 1.

POWER—*Appointment—Power of Revocation—Joint Appointment—Revocation by Survivor.*] By a marriage settlement certain funds were settled upon trust for the children of the marriage in such shares and in such manner as the husband and wife during their joint lives by deed, with or without power of revocation and new appointment, should appoint; and in default of and subject to such joint appointment, then as the survivor of them should by deed, with or without power of revocation and new appointment, or by will, appoint. The husband and wife made a joint appointment of part of the trust funds, with a proviso that the appointment thereby made was made "subject to the power of revocation and new appointment mentioned in the settlement."—After the death of the wife, the husband executed a deed revoking the joint appointment and

POWER—*continued.*

making a new appointment of the fund:—*Held* (affirming the decision of North, J.), first, that the husband and wife had power in their joint appointment to reserve a power of revocation and new appointment to the survivor.—Secondly, that such a power of revocation and new appointment was effectually reserved in the joint appointment. —*Brudenell* v. *Elwes* (1 East, 442) and *Dixon* v. *Pyner* (55 L. J. (Ch.) 566) followed. *In re* Harding. Rogers *v.* Harding - **C. A. 315**

2. —— *Appointment—Special Power—Will—General Bequest—Execution of Power—Intention —Evidence as to state of Property—Admissibility.*] A testatrix, having a special power of appointment by deed or will over personal estate in favour of her children, by her will directed that "all my property of every kind" should be divided among her children in certain shares, but made no express reference to her power:—*Held*, that the will did not operate as an execution of the power; and that, the gift being general, an affidavit shewing the state of the testatrix's property at the date of her will and of her death was not admissible as evidence of her intention. *In re* Huddleston. Bruno *v.* Eyston - **595**

—— General power of appointment—French will by domiciled Frenchman—Real or personal estate—Conversion - - **607**
See Will. 5.

—— Of sale—Settled Estates Act - - **520**
See Settled Estates Act.

PRACTICE—*Attachment — Service of Notice of Motion—Defendant who has not Appeared—Rules of the Supreme Court*, 1883, *Order* xliv., *r.* 2; *Order* liii., *rr.* 3, 4; *Order* lxvii., *r.* 4.] On the 27th of April an order was made that the Defendant, who had not entered an appearance in the action, should, within fifteen days after service of the order, leave at the Chambers of the Judge certain accounts and statements. The order was served on the Defendant personally on the 12th of May. The Defendant did not comply with the order, and on the 8th of June the Plaintiff gave notice of motion for leave to issue an attachment against him. The notice was not served on the Defendant, but was filed with the officer of the Court pursuant to rule 4 of Order lxvii.:—*Held*, that, as the Plaintiff evidently knew where to find the Defendant, leave ought not to be given to issue an attachment unless notice of the motion was served on the Defendant. *In re* Bassett. Bassett *v.* Bassett - - **179**

2. —— *Compromise — Absent Persons — Dissentient Persons—Jurisdiction to approve Compromise—Rules of Supreme Court*, 1883, *Order* xvi., *r.* 9a.] The Court has jurisdiction under Order xvi., rule 9a, to approve a compromise between the parties to an action, and to make it binding on absent persons who have not assented to it. But the Court cannot bind absent persons who have dissented from the compromise, and if it sanctions the compromise will only do so on the terms of making provision to satisfy the full claims of the dissentient persons. Collingham *v.* Sloper. Foreign, American and General Investments Trust Company *v.* Sloper **C. A. 716**

PRACTICE—*continued.*

3. —— *Interrogatories — Allowance of by Judge—Objection to Answer—Rules of Supreme Court*, 1883, *Order* xxxi., *rr.* 1, 6.] In a suit relating to the affairs of a partnership A. and R. were Defendants as executors of a deceased partner W., and R. was also Defendant in respect of an interest in the partnership. An order was made in a suit for the administration of W.'s estate, giving A. the conduct of the defence on behalf of W.'s estate. The Plaintiff exhibited interrogatories for the examination of A. and R., which were laid before the Judge, who made some alterations and allowed the interrogatories as altered. A. appealed from the allowance of interrogatories to be administered to R., and also, as regarded himself, appealed against the allowance of the interrogatories as premature:—*Held*, that A.'s being appointed to defend the suit on behalf of W.'s estate did not affect the Plaintiff's right to interrogate R.—The allowance by a Judge of interrogatories to be administered to a party does not amount to a decision that the party is bound to answer them, but leaves him at liberty to take any objection to answering which he might otherwise have taken.—An appeal from the allowance of interrogatories by a Judge will not be allowed unless the Judge has gone on a wrong principle or done substantial injustice.—The appeal was therefore dismissed. Peek *v.* Ray - - - - - **C. A. 282**

4. —— *Originating Summons — Form of — Specific Question.*] An originating summons to obtain the opinion of the Court upon the construction of an instrument should state the questions categorically, and not in such general terms as, "who are or is entitled to" the property in question. *In re* Harman. Lloyd *v.* Tardy **[607**

5. —— *Payment into Court—Money not in the hands of Trustees—Rules of Supreme Court*, 1883, *Order* lv., *r.* 3 (*d*).] Money will not be ordered to be paid into Court by executors, administrators, or trustees under Order lv., rule 3 (*d*), unless it is actually in their hands. It is not sufficient that it has been in their hands, and that they are responsible for it.—*Re Chapman* (54 L. T. (N.S.) 13) disapproved. Nutter *v.* Holland - - - - **C. A. 408**

6. —— *Payment into Court—Order on Motion —Admission by Defendant—Admissions in Letters before Action.*] In an action to compel the Defendant to make good an alleged breach of trust, the Plaintiffs moved for an order that the Defendant should pay into Court £1000, on the ground that he had by letters written before action admitted that that sum was in his hands on behalf of the Plaintiffs:—*Held*, that, even if the letters taken alone amounted (which the Court, differing from Chitty, J., thought they did not) to an admission that the £1000 was in the Defendant's hands, the Court ought to have regard to an affidavit made by him in answer to the motion; and that, looking at the statements contained in that affidavit, an order for payment into Court ought not to be made.—The practice of ordering payment of money into Court by a Defendant upon interlocutory motion, on the ground

PRACTICE—*continued.*
of admissions made by him, ought not to be extended any further than it was extended by Jessel, M.R., in *Freeman* v. *Cox* (8 Ch. D. 148). —Decision of Chitty, J., reversed. NEVILLE *v.* MATTHEWMAN - - - - C. A. 345

7. —— *Receiver—Judgment Debtor—Equitable Execution—Delivery of Possession—Earnings of Theatre—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 8.] A judgment for debt was recovered against a theatre company. The theatre was subject to a mortgage. The company had no land except the theatre, of which they were lessees and were in occupation, and they were using it for the ordinary purposes of a theatre:—*Held* (reversing a decision of Kekewich, J.), that a receiver could not be appointed at the instance of the judgment creditor to receive by way of equitable execution the moneys paid by the public for entrance to the theatre:—But *held*, that a receiver ought to be appointed of the rents and profits of the company's lands by way of equitable execution, without prejudice to the rights of any prior incumbrancers, and that the company should be ordered to deliver up possession of the lands to him. CADOGAN *v.* LYRIC THEATRE, LIMITED - - - C. A. 338

8. —— *Service—Concurrent Writ—Service out of Jurisdiction—Irregularity—"Action properly brought against Person duly served within the Jurisdiction"—Separate Relief against Defendants within and out of Jurisdiction—Rules of Supreme Court*, 1883, *Order* VI., *r.* 1; *Order* XI., *rr.* 1 (*g*), 4.] Where leave is granted for the issue of a concurrent writ to be served on a person out of the jurisdiction, the copy served ought to be marked "concurrent," and if this is not done the service is irregular.—On an application to serve a person out of the jurisdiction under Order XI., rule 1 (*g*), it must be shewn that the defendant within the jurisdiction against whom relief is sought has, previously to such application, been duly served with the writ.—*Yorkshire Tannery and Boot Manufactory* v. *Eglinton Chemical Company* (54 L. J. (Ch.) 81) followed, notwithstanding observations thereon in *Tassell* v. *Hallen* ([1892] 1 Q. B. 321).—In order to bring a case within Order XI., rule 1 (*g*), the relief sought against the defendant out of the jurisdiction must be not necessarily the same as, but connected with the relief sought against the defendant within the jurisdiction. Where, therefore, an action was brought by a trustee in bankruptcy against mortgagees, resident within the jurisdiction, of the interest of the bankrupt under a will in property situate out of the jurisdiction, and against the trustee of the will, who was resident out of the jurisdiction, claiming accounts and redemption against the mortgagees, and as against the trustee, that out of the property in his hands in trust for the bankrupt he should be directed to pay the sums found due to the mortgagees, and pay and account for the value of the property to the Plaintiff as trustee in bankruptcy: *Held*, that the relief sought against the mortgagees was not so connected with the relief sought against the trustee as to bring the case within Order XI., rule 1 (*g*); and that leave to serve the writ on the trustee ought not to be granted. COLLINS *v.* NORTH BRITISH AND MERCANTILE INSURANCE COMPANY. PRATT *v.* SAME [C. A. 228

—— Contempt of Court - - - 193
See CONTEMPT OF COURT.

—— Costs—Administration action—Order of Probate Court—Real estate - 615
See EXECUTOR. 1.

—— Lunacy—Receiver of dividends - 412
See LUNATIC.

—— Partition action—Parties - - 554
See PARTITION.

—— Partnership action—Costs - - 326
See PARTNERSHIP. 1.

—— Settled Land Acts—Costs - - 439
See SETTLED LAND ACTS. 2.

PRINCIPAL AND SURETY—*Contribution—Deed of Arrangement executed by Surety—Proof by co-Sureties as Assignees of the Principal Debt—Mercantile Law Amendment Act*, 1856 (19 & 20 *Vict. c.* 97), *s.* 5.] When one of two co-sureties has paid the creditor the whole of the debt and taken an assignment of the securities, he is entitled, under sect. 5 of the Mercantile Law Amendment Act, 1856, to bring an action against his co-surety, or to prove against his estate, as the assignee of the creditor, for the full amount of the debt, although he can only actually recover the just proportion which, as between the sureties, the co-surety is liable to pay.—The decision of Kekewich, J., affirmed.—But, *quære* (*per* Davey, L.J.), whether the result would be the same if the surety claimed under his right to contribution, and not as assignee of the creditor.—*Ex parte Stokes* (De G. 618) followed. *In re* PARKER. MORGAN *v.* HILL - - - C. A. 400

PRIORITY—Assignment of choses in action—Lis pendens - - - 483
See LIS PENDENS.

—— Partnership action—Costs—Debt to partner
See PARTNERSHIP. 1. [326

PRIVATE HEARING—Publication of proceedings in newspaper - - - 193
See CONTEMPT OF COURT.

PROBATE COURT—Order as to costs—Jurisdiction to make real estate liable - 615
See EXECUTOR. 1.

PROOF—Bankruptcy—Surety against co-surety
See PRINCIPAL AND SURETY. [400

RAILWAY — *Accommodation Works — Personal Services—Landowner—Conveyance—Covenant—Transfer of Undertaking to New Company—Liability of New Company—Specific Performance—Form of Judgment.*] Where a railway company has, on the purchase of land for the purposes of their Act, and as part of the consideration, entered into covenants with the landowner to make and maintain certain accommodation works, and also to perform certain acts in the nature of personal service, and then, by a subsequent Act of Parliament, the company is dissolved and its undertaking transferred to another railway company "subject to the obliga-

RAILWAY—*continued.*

tions and liabilities" of the old company, the landowner can maintain an action against the new company for specific performance of the whole of the covenants, including that for personal service.—Form of judgment against a railway company for specific performance of covenants. FORTESCUE *v.* LOSTWITHIEL AND FOWEY RAILWAY COMPANY - - - - 621

2. —— *Accommodation Works — Agreement with Landowner — Transfer of Undertaking to another Company—Liability of New Company—Statutory Obligation.*] A landowner agreed to sell a piece of land to a dock company, and the company agreed to make a road from the dock to his land. The company obtained an Act by which they were empowered, subject to the agreement with the landowner, to construct certain works. The dock company did not make the road, and another Act was afterwards passed by which, after reciting the Dock Company's Act and the agreement with the landowner therein referred to, the dock company's undertaking and works were vested in the defendant company; subject to all the obligations in the dock company under the recited Act with respect to the working and user of the vested property:—*Held*, that the defendant company was liable specifically to perform the agreement with the landowner. EARL OF JERSEY *v.* GREAT WESTERN RAILWAY COMPANY - - - - C. A. 625 n.

RECEIVER—Equitable execution—Earnings of theatre - - - - 338
See PRACTICE. 7.

—— Lunatic's estate—Person incapable of managing his affairs - - - 412
See LUNATIC.

RECEIVING ORDER — Bankruptcy — Infant partner - - - - 607
See BANKRUPTCY.

REGISTRATION—Copyright - - 663
See COPYRIGHT. 2.

—— Lis pendens—Personal estate - 483
See LIS PENDENS.

—— Securities—Land registry - - 464
See LAND REGISTRY.

RELATIONS—Power to appoint to—Next of kin—Illegitimate person - - 565
See WILL. 1.

REMOTENESS—Trust for sale—Will - 381
See WILL. 6.

REMUNERATION—Solicitor **100, 156, 238, 641**
See SOLICITOR. 2, 3, 4, 5.

RENT-CHARGE—*Conveyance of Land and Easement to Corporation reserving Perpetual Rent—Charge on Rates and Tolls—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *ss.* 10, 11.] A perpetual rent reserved as the consideration upon the sale of land, even though no power of distress is contained in the conveyance to the purchaser, is, upon a subsequent sale of the rent, not improperly described by the then vendor as a "rent-charge," inasmuch as a power of distress is conferred by the Act 4 Geo. 2, c. 28, s. 5.—In a contract for sale the subject-matter was described as "an aggregate yearly rent-charge of

RENT-CHARGE—*continued.*

£215 9*s.*, payable in perpetuity by the Corporation of Liverpool in respect of a waterpipe rent, created under the authority of the Liverpool Corporation Waterworks Act, 1855, and secured by covenants of the corporation, and by a statutory charge on the rates leviable by the corporation under their Acts."—The abstract of title shewed that in 1856 the vendor's predecessors in title (one of whom was an absolute owner, and the other a tenant for life under a settlement) had respectively granted lands and easements to the corporation in consideration of two rents of £1 5*s.* and £250, respectively payable in perpetuity by the corporation, and that the corporation had covenanted to pay those rents respectively. The rent comprised in the contract of sale consisted of the rent of £1 5*s.* and £214 4*s.*, part of the rent of £250. The vendor was tenant for life under a settlement, and had sold under his statutory powers. The Act of 1855 (with which the Lands Clauses Consolidation Act, 1845, was incorporated) empowered the corporation "to purchase, either absolutely for a sum in gross, or at an annual or other rent," certain lands "or any easement over the same"; and the Act provided that "the persons empowered by the Lands Clauses Consolidation Act, 1845, to convey lands shall have full power to convey or grant in perpetuity, at an annual or other rent, any lands, for the purposes of this Act or the Acts incorporated therewith, or any easement over such lands":—*Held*, that the rent sold was not improperly described as a "rent-charge," and that by virtue of sect. 11 of the Lands Clauses Consolidation Act, 1845, it was charged on the water rates leviable by the corporation. *In re* LORD GERARD AND BEECHAM'S CONTRACT - - - C. A. 295

REPUDIATION—Contract by infant - 589
See INFANT. 1.

RESTRAINT OF TRADE—*Restrictive Covenant—Covenant not to carry on "similar Business."*] The Plaintiffs granted a lease to the A. B. Company containing a covenant that the tenants would not carry on the business of a restaurant similar to that carried on by R., another tenant of the Plaintiffs. R. was an hotel-keeper who had a restaurant on licensed premises connected with his hotel. The A. B. Company carried on a restaurant at which they sold tea, coffee, cocoa, pastry, and cold meat, but not any hot meat except beef pies, and this was not objected to. The A. B. Company having assigned their lease to the Defendant, he proceeded in his restaurant to sell hot meat and other things not sold by the A. B. Company. The Defendant had not a license for the sale of intoxicants, nor a victualler's license; his establishment was on a much smaller scale than that of R., his premises were of an inferior class to those of R., and his prices were much lower:—*Held*, by Kekewich, J., that the Defendant's business of a restaurant was not similar to that of R., and that there had been no breach of the covenant:—*Held*, on appeal, that the test whether the Defendant's business was similar to that of R. was whether it was sufficiently like it to compete with it, and that, judging by this rule, although there were considerable differences between R.'s business and that of the Defendant,

RESTRAINT OF TRADE—*continued.*
the Defendant's business was similar to that of R., and that an injunction must be granted in the terms of the covenant, with a proviso that it was not to prevent the Defendant from selling any of the articles in which the A. B. Company had dealt. DREW *v.* GUY - - - **C. A. 25**

RESTRAINT ON ANTICIPATION — Separate estate — Costs payable by married woman - - - **135, 376**
See HUSBAND AND WIFE. 1, 2.

REVOCATION — Joint appointment — Power of survivor to revoke - - - **315**
See POWER. 1.

—— License—Patent - - - **388**
See PATENT.

RULES IN LUNACY, 1892, Schedule Form 1 (e)
See LUNATIC. **[412**

RULES OF SUPREME COURT, Order VI., r. 1
See PRACTICE. 8. **[228**

—— **Order XI., rr. 1 (g), 4** - - - **228**
See PRACTICE. 8.

—— **Order XVI., r. 9A** - - - **716**
See PRACTICE. 2.

—— **Order XXXI., rr. 1—6** - - **282**
See PRACTICE. 3.

—— **Order XLIV., r. 2** - - - **179**
See PRACTICE. 1.

—— **Order LII., rr. 3, 4** - - - **179**
See PRACTICE. 1.

—— **Order LV., r. 3 (d)** - - - **408**
See PRACTICE. 5.

—— **Order LXVII., r. 4** - - - **179**
See PRACTICE. 1.

RULES UNDER SOLICITORS' REMUNERATION ACT, Rule 2, Sched. I., Part I. - **156**
See SOLICITOR. 2.

—— **Rules 2, 4, Sched. I., Part I.** - - **238**
See SOLICITOR. 4.

—— **Rule 4, Sched. I., Part I., rule 11** - **100**
See SOLICITOR. 3.

SEPARATE ESTATE—Restraint on anticipation **[135, 376**
See HUSBAND AND WIFE. 1, 2.

SEQUESTRATION—Wife's separate estate—Restraint on anticipation - - **135**
See HUSBAND AND WIFE. 1.

SERVICE—Contract of—Negative clause - **654**
See CONTRACT.

—— Notice of motion for attachment - **179**
See PRACTICE. 1.

—— Out of jurisdiction—Concurrent writ **228**
See PRACTICE. 8.

SETTLED ESTATES ACT—*Authority to Exercise Statutory Power of Sale—Female Trustee—Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18).] Upon the hearing of a petition under the Settled Estates Act, 1877, asking that two ladies (respectively a widow and a spinster), the then trustees of a will, might be authorized to sell the whole or any part or parts of the estates devised, the Court in the first instance refused to confer the authority upon

SETTLED ESTATES ACT—*continued.*
two ladies, and the petition was ordered to stand over generally.—Upon further evidence shewing that the Petitioners had been unable to procure any other suitable persons to act as trustees, though they had endeavoured to do so, the Court made an order conferring the authority asked for on the two ladies during their joint lives, subject to the approval of the Court in the case of each sale. *In re* PEAKE'S SETTLED ESTATES - - **520**

SETTLED LAND ACTS—*Building Lease—Agreement to lay out a Specific Sum in Repairs—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 8, *sub-s.* 1, *s.* 63; *Settled Land Act*, 1884 (47 & 48 *Vict, c.* 18), *s.* 7.] A lease made partly in consideration of the lessee agreeing to expend a specific sum of money in doing the improvements and repairs specified in a schedule is a building lease within the meaning of the Settled Land Act, 1882, s. 8, sub-s. 1.—The Court, in the exercise of its discretion under the Settled Land Act, 1884, s. 7, will not sanction a building lease in which the repairs or improvements agreed to be done by the lessee are such as an ordinary landlord is expected to do. *In re* DANIELL'S SETTLED ESTATES - - - - - **C. A. 503**

2. —— *Sale by Tenant for Life—Costs of Sale—Several Persons constituting Tenant for Life—Right to employ separate Solicitors—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-s.* 6; *s.* 21, *sub-s. x.*; *s.* 53.] Upon a sale of settled land by twenty-five persons, who together constituted the tenant for life for the purposes of the Settled Land Act, 1882, all the vendors employed the same solicitor to conduct the sale and to deduce title to the property, but four of them employed separate solicitors to peruse and complete on their behalf the conveyances to the purchasers:—*Held*, by the Court of Appeal, that the costs incurred by these separate solicitors must be paid out of the proceeds of sale.—Decision of Kekewich, J., reversed. SMITH *v.* LANCASTER **[C. A. 439**

SETTLEMENT—*Husband and Wife—After-acquired Property—Covenant to Settle Property from any Source—Determination of Coverture—Property acquired after—Supplying words "during Coverture"—Ambiguity—Recitals.*] By a marriage settlement, after reciting an agreement that the husband and wife should covenant in manner thereinafter mentioned as to any personal property which "during their joint lives" should be given or bequeathed to the wife or the husband in her right, the husband and wife jointly and severally covenanted with the trustees that, "if at any time after the marriage and during the life" of the wife any personal estate should be given or bequeathed or come to her or the husband in her right, the husband and wife would settle the same. And the husband also covenanted for the settlement of any personal estate that should "at any time thereafter" come to him.—The wife survived the husband, and after his death became entitled to a fund in Court as next of kin of an intestate:—*Held*, that the wife's covenant was to be read as operative during coverture only, and that this construction was assisted by the recital, which might be re-

SETTLEMENT—*continued.*
ferred to in order to explain the ambiguity in the covenant. *In re* Coghlan. Broughton *v.* Broughton - - - - - - 76

SHARES—Application for—Verbal withdrawal *See* Company. 7. [272

—— Company limited by guarantee - 538 *See* Company. 1.

—— Contract by infant—Repudiation - 589 *See* Infant. 1.

—— New—Allotment in lieu of dividend 578 *See* Tenant for Life and Remainderman.

SOLICITOR — *Liability —Mortgage —Trustee de son tort.*] Solicitors of a mortgagee trustee *held* not liable for the insufficiency of the security, though the mortgage money was paid through them. Brinsden *v.* Williams - - 185

2. —— *Remuneration — Conducting Sale — Advowson in gross—Freehold Property—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order under the Act, Sched. I., Part I.*] An advowson in gross though an incorporeal hereditament is freehold property within the meaning of Sched. I., Part I., to the order made in pursuance of the Solicitors' Remuneration Act, 1881, and on a purchase and sale the scale charge applies.—*In re Stewart* (41 Ch. D. 494) discussed and distinguished. *In re* Earnshaw-Wall 156

3. —— *Remuneration — Conducting Sale — "Auctioneer's Commission" — Scale Charges — General Order under Solicitors' Remuneration Act*, 1881, *r.* 4; *Sched. I., Part I., r.* 11.] Solicitors employed in a sale of property by auction conducted all the business connected with the sale, except taking the bids in the auction-room, for which the solicitors paid the auctioneer two guineas for each lot sold, and one guinea for each lot unsold. The solicitors claimed both the sum paid to the auctioneer and the scale fee for conducting the sale:—*Held* (affirming the decision of the Vice-Chancellor of the County Palatine of Lancaster), that the payment to the auctioneer was a commission under rule 11 of Sched. I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881, and that the solicitors were not entitled to charge for remuneration under the scale, but only for a quantum meruit.—*In re Peace & Ellis* (36 W. R. 61; W. N. (1887) 186) approved. Drielsma *v.* Manifold C. A. 100

4. —— *Remuneration — "Completing Conveyance" — Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order under the Act, rr.* 2, 4; *Sched. I., Part I.—Purchase and Sub-sale—Charge for Preparation of Plan.*] Purchasers of land for £2550 employed a solicitor to act for them. The solicitor perused the contract on their behalf, received from the purchasers an abstract of title, and duly investigated the same. After the title had been investigated the purchasers sold part of the land to a sub-purchaser for £1800, and the solicitor, at their request, prepared the contract with the sub-purchaser, and delivered to his solicitor an abstract of title, consisting of the abstract furnished by the vendors, together with a statement of the equitable title of the purchasers. The transaction was

SOLICITOR—*continued.*
carried out by two conveyances—one by the vendors by the direction of the purchasers of part of the land to the sub-purchaser in consideration of £1800, and the other by the vendors direct to the purchasers of the rest of the land in consideration of £750. The solicitor delivered two bills of costs, charging in one a scale fee under the Solicitors' Remuneration Act, 1881, on a purchase by his clients for £2550, and in the other a scale fee on a sale by his clients for £1800. On taxation a scale fee was allowed only in respect of a contract for £750. On summons to review the taxation:—*Held*, that the conveyance to the sub-purchaser was substantially a conveyance by the vendors to the purchasers, that the solicitor had done all that was necessary for the completion of a conveyance under the original contract for £2550, and that he was entitled to two scale fees—one on a purchase by his clients for £2550, and the other on a sale by his clients for £1800.—*In re Lacey & Son* (25 Ch. D. 301) distinguished.—One of the bills of costs included, among "disbursements," an item of 10*s.* for law-stationer's charges for the preparation of a plan indorsed on one of the deeds. The plan was a copy of one already in existence, and the preparation of it did not require the skilled labour of a surveyor:—*Held*, that this charge was covered by the scale fee, and was rightly disallowed on taxation. *In re* Read - - 238

5. —— *Remuneration—"Deducing" Title—Mortgage of Leaseholds—Abstract of Title consisting solely of Leases to Mortgagor—General Order under Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44), *Sched. I., Part I.*] A solicitor to a mortgagor of leaseholds, who simply produces and delivers an abstract of the leases under which the mortgagor holds, has not deduced title within the meaning of Sched. I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881, and consequently is not entitled to charge the scale fee. Wellby *v.* Still - - - - - - 641

—— Sale under Settled Land Acts — Several tenants for life—Costs - - 439 *See* Settled Land Acts. 2.

SPECIFIC DEVISE — Insufficient description — Election—Intestacy - - 260 *See* Will. 7.

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13 Eliz. c. 5, s. 5—*Fraudulent Conveyances* *See* Vendor and Purchaser. 1. [267
27 Eliz. c. 4, s. 3—*Fraudulent Conveyances* *See* Vendor and Purchaser. 1. [267
21 Jac. 1, c. 16, s. 3—*Limitation of Actions* *See* Limitations, Statute of. 1. [290
9 Geo. 2, c. 36—*Mortmain* - - 704 *See* Charity. 3.
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2 & 3 Will. 4, c. 71, ss. 3, 4—*Prescription* 659
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11 & 12 Vict. c. 63, ss. 2, 49, 90—*Public Health*
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16 & 17 Vict. c. 137, ss. 62, 66—*Charitable Trusts* - - - - 145
See CHARITY. 1.

19 & 20 Vict. c. 97, s. 5—*Mercantile Law Amendment* - - - 400
See PRINCIPAL AND SURETY.

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25 & 26 Vict. c. 68, ss. 1, 2, 4, 6—*Fine Arts Copyright* - - - - 109
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25 & 26 Vict. c. 89, ss. 7, 14—*Companies* 538
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28 & 29 Vict. c. 78, ss. 10, 46—*Mortgage Debentures* - - - - - 464
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32 & 33 Vict. c. 56, ss. 4, 5, 6, 8, 9, 24—*Endowed Schools* - - - - 524
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33 & 34 Vict. c. 20, ss. 8, 9—*Mortgage Debentures*
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37 & 38 Vict. c. 57, ss. 1, 2, 8—*Real Property Limitations* - - - - 220
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40 & 41 Vict. c. 18—*Settled Estates Act* 520
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45 & 46 Vict. c. 38, s. 2, sub-s. 6; s. 21, sub-s. x.—*Settled Land Act* - - 439
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45 & 46 Vict. c. 75, s. 1—*Married Woman's Property* - - - - 135
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56 & 57 Vict. c. 63, ss. 1, 2—*Married Woman's Property* - - - - 135
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STREET—Paving of — Liability of owner — Trustee for charity - - 209
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SUBROGATION—Mortgage to building society
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TABLEAUX VIVANTS—Copyright—Infringement - - - - - 109
See COPYRIGHT. 3.

TAXATION—Bill of costs—Solicitors' Remuneration Act - - 100, 156, 238, 641
See SOLICITOR. 2, 3, 4, 5.

TENANT FOR LIFE—Sale under Settled Land Acts - - - - - 439
See SETTLED LAND ACTS. 2.

TENANT FOR LIFE AND REMAINDERMAN—*Shares in Company subject to Trusts of Will—Declaration of Dividend—Issue of New Shares—Option to take Allotment in Lieu of Dividend on Old Shares—Exercise of Option by Trustees—Proceeds of Sale of New Shares—Capital or Income.*] A testator, who died in 1889, gave his residuary estate to trustees upon trust for his widow for life, and after her death, for division amongst others; and gave his trustees power to postpone conversion of any part of his property for so long as they should think fit. At the date of his death the testator was possessed of shares in a company. In 1893 the company, by special resolution, resolved to increase its capital by the issue of new shares, and empowered the directors to offer such new shares to the existing shareholders in payment or part payment of any dividend for the time being. A dividend was afterwards declared out of profits, which the company was in a position to pay in cash. Half of such dividend was paid in cash, and in respect of the balance an allotment of new shares was offered to the shareholders, and such as did not accept the offer received the remainder of the dividend in cash. The trustees of the will accepted the allotment, and allowed the new shares to be allotted to the tenant for life:—*Held*, first, upon the evidence, that the company intended to distribute its profits as dividend, and not to capitalize them; and, secondly, that the tenant for life was only entitled to so much of the value of the new shares as represented the dividend applied by the trustees in taking them up, the balance of such value forming part of the capital of the estate.—The principles laid down in *Bouch* v. *Sproule* (12 App. Cas. 385) and *Rowley* v. *Unwin* (2 K. & J. 138) considered and applied. *In re* MALAM. MALAM *v.* HITCHENS [578

TRADE MARK—"*Invented Word*"—*Geographical Name*—"*Eboline*"—*Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c*, 57), *s.* 64—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 10, *sub-ss.* (*d*) (*e*).] A word already in existence cannot properly be said to be an "invented word" because the person claiming to have invented it was not aware of its existence.—The word "Eboline." being a word compounded of the word "Eboli" (the name of a town in Italy) with the English suffix "ne," is not an "invented word" within the meaning of sub-s. (*d*) of sect. 64 of the Patents, Designs, and Trade-marks Act, 1883, as amended by sect. 10 of the Act of 1888, and it is a "geographical name" within the meaning of sub-sect. (*e*) of the same section.—The prohibition contained in sub-sect. (*e*) is not confined to the use of the noun substantive, but it extends to the adjective and to the name of a place to which an ordinary

TRADE MARK—*continued.*
English suffix has been added so as to impart to it an adjectival form. *In re* SIR TITUS SALT, BART., SONS, AND COMPANY'S APPLICATION 166

TRADE NAME—*Passing off Defendant's Goods as those of Plaintiff—Injunction.*] The Plaintiff and his predecessors in trade had for thirty-four years made and sold a sauce under the name of "Yorkshire Relish," these words being printed upon labels on the bottles and upon wrappers. In 1884 the Plaintiff registered the words "Yorkshire Relish" as his trade-mark, but in 1893 the trade-mark was, at the instance of the Defendants, removed from the register. Down to November, 1893, no sauce but that of the Plaintiff was in the market under the name of "Yorkshire Relish," but about that time the Defendants began to place on the market a sauce which they described as "Yorkshire Relish." This name was printed on the labels placed on their bottles and on the wrappers of the bottles, but the labels differed in their general appearance from those of the Plaintiff, and there was a statement on both the labels and the wrappers that the sauce was manufactured by the Defendants. The Plaintiff brought an action to restrain the Defendants from passing off, or attempting to pass off, their sauce as that of the Plaintiff. Upon a motion for an interim injunction, evidence was given by a chemist, who had analysed both sauces, that there was a wide difference between them:—*Held* (affirming the decision of Stirling, J.), that the Defendants had not sufficiently distinguished their sauce from that of the Plaintiff, and that an interim injunction must be granted restraining them from using the words "Yorkshire Relish" as descriptive of or in connection with their sauce without clearly distinguishing their sauce from the Plaintiff's. POWELL *v.* BIRMINGHAM VINEGAR BREWERY COMPANY - - - - - C. A. 449

TREES—Overhanging neighbour's land - 1
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TRUST—Advancement and benefit of legatee—Absolute interest - - - 204
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TRUSTEE—Insufficient investment—Solicitor's liability - - - - 185
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—— Settled Estates Act—Appointment of female trustees - - - - 520
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TURBARY—Right of—Vested in trustee for charity—Liability of trustee to expenses under Public Health Act - - 209
See LOCAL GOVERNMENT. 2.

ULTRÀ VIRES ACT—Mortgage to building society—Part payment by third party
See BUILDING SOCIETY. [86

UNSOUND MIND—Person not found lunatic—Jurisdiction - - - - 412
See LUNATIC.

VENDOR AND PURCHASER—*Title—Voluntary Conveyance to Predecessor of Vendor—Repudiation of Contract to Purchase—Specific Performance—*13 *Eliz. c.* 5, *s.* 5; 27 *Eliz. c.* 4, *s.* 3.] A person who has contracted to purchase land is not entitled to repudiate his contract simply because one link in the vendor's title consists of a voluntary conveyance to a person under whom the vendor claims by purchase for value. NOYES *v.* PATERSON - - - - - 267

2. —— *Wilful Default—Vendor and Purchaser Act,* 1874 (37 & 38 *Vict. c.* 78), *s.* 9—*Compensation.*] Delay in completing a sale occasioned by the vendors having omitted to take steps to procure certain admissions to copyholds, *held* to arise from the wilful default of the vendors.—Damages to the purchaser by reason of such delay, *held* not recoverable as compensation under the Vendor and Purchaser Act. *In re* WILSONS & STEVENS' CONTRACT - - - 546

VOLUNTARY CONVEYANCE—Link in title—27 Eliz. c. 4 - - - - 267
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VOLUNTARY SUBSCRIPTION — Charity — Endowment—Jurisdiction of Charity Commissioners - - - - 145
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VOLUNTARY WINDING-UP—Petition—Supervision order - - - - 722
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WARD OF COURT—Injunction to restrain marriage—Publication of proceedings 193
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WATER—Supply of—Power of local authority
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—— Underground springs—Diversion of water
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WATERWORKS—*Underground Springs—Interference with Flow of Water—Injunction—Tunnel for draining Mine—Mala fides—Indirect Motive—Works undertaken for purpose of Extorting Money.*] The Plaintiffs were the owners of waterworks which they had purchased from a company, which had constructed them under the powers of a special Act. The undertaking of the company was vested in the Plaintiffs. The Act authorized the company to take the water from some springs, called Many Wells, and sect. 49 provided that "It shall not be lawful for any person other than the company to divert, alter, or appropriate in any other manner than by law they may be legally entitled any of the waters supplying or flowing from certain streams and springs called 'Many Wells,' . . . . or to sink any well or pit, or do any act, matter, or thing whereby the waters of the said springs might be drawn off or diminished in quantity," The Act contained no provision for compensating landowners whose rights might be affected by this section. The company accordingly appropriated the water of Many Wells Springs, and the Plaintiffs continued to do so.—The Defendant, who owned land adjoining the Many Wells Springs, proposed to construct on his own land an underground drift or tunnel, the effect of which would be seriously to diminish, if not to cut off entirely, the flow of water at the springs. His professed object in doing this was to drain some beds of stone lying under his land, so that he might be able to work them. The Court came to the conclusion on the evidence that the Defendant was not acting bonâ fide, and that his real object was to force the Plaintiffs to buy him off:—*Held,* that what the Defendant proposed to do was prohibited by sect. 49, and that an injunction must be granted to restrain him from making the tunnel:—But *held,* that, if the Defendant had been legally entitled to construct the tunnel, he could not have been restrained from doing so on the ground that he was actuated by a malicious or improper motive. CORPORATION OF BRADFORD *v.* PICKLES - - - - 53

WILFUL DEFAULT—Vendor and purchaser—Compensation - - - 546
See VENDOR AND PURCHASER. 2.

WILL—*Class—Power to Appoint amongst "Relations" of Donee—Donee of Power Illegitimate—Statutory Next of Kin—Lord Selborne's Act* (37 & 38 *Vict. c.* 37)]. The testator by his will, dated in 1854, gave all his property to his wife for life, and after her death directed the payment of legacies and gave a moiety of the residue of his property to his wife's "relations" as she might direct. The testator's wife was born out of wedlock; but her parents married after her birth and had other children, and she was always recognised by her parents as their child, and no difference was made by them between her and her natural brothers and sisters. The testator was aware of his wife's origin, and at the date of his will she was forty-seven years of age and childless. She survived the testator, and by her will, dated in 1891, purported to exercise the power in favour of children and grandchildren of her natural brothers and sisters:—*Held,* (1.) That the word "relations" must be construed as meaning those persons who would have been her relations if she had been legitimate; (2.) That the power was merely a distributive one, and, according to the rule established by the cases before Lord Selborne's Act, the class of relations amongst whom the widow could appoint was confined to her next of kin; (3.) That that rule of construction had not been altered by Lord Selborne's Act. —*In re Standley's Estate* (Law Rep. 5 Eq. 303) not followed. *In re* DEAKIN. STARKEY *v.* EYRES [565

2. —— "*Die without leaving any Male Issue*"—*Indefinite Failure of Issue—Estate Tail or in Fee Simple—Wills Act* (1 *Vict. c.* 26), *s.* 29.] Sect. 29 of the Wills Act applies to the case of a gift over on death without "male" issue.—Where, therefore, lands were devised to A., his heirs and assigns, with a gift over if A. should "die without leaving any male issue":—*Held,* that A. took an estate in fee simple subject to an executory

WILL—*continued.*

devise over.—*Upton* v. *Hardman* (Ir. R. 9 Eq. 157) followed. *In re* Edwards. Edwards *v.* Edwards - - - - - - 644

3. —— *Gift of £3 per cent. Annuities—Will dated* 1887—*National Debt (Conversion) Act*, 1888 (51 & 52 *Vict. c.* 2), *s.* 25, *sub-s.* 2.] In the first branch of sub-sect. 2 of sect. 25 of the National Debt (Conversion) Act, 1888, instrument includes a will.—North, J.'s, explanation of the sub-section in *Duke of Northumberland* v. *Percy* ([1893] 1 Ch. 298, 303) adopted. *In re* Howell-Shepherd. Churchill *v.* St. George's Hospital - 649

4. —— *Gift to Next of Kin "after the death of A."—Life Estate by Implication.*] Under a bequest, after the death of A., to the testator's next of kin according to the statute, A. takes a life estate by implication, upon the reasoning of Cotton, L.J., in *Ralph* v. *Carrick* (11 Ch. D. 873), as applied to a devise, after the death of A., to the testator's heirs; but not so where the bequest is after the death of A., to persons who happen to be some members of the class of the testator's next of kin. *In re* Springfield. Chamberlin *v.* Springfield - - - - 603

5. —— *General Power of Appointment—French Will—Domiciled Frenchman—Real Estate—Partition Action—Sale—Proceeds liable to be laid out in Purchase of Land—Conversion—Reinvestment in Stock—General Bequest—Exercise of Power of Appointment—Wills Act*, 1837 (1 *Vict. c.* 26), *s.* 27—*Settled Estates Act*, 1877 (40 & 41 *Vict. c.* 18), *s.* 34—*Practice—Originating Summons, Form of—Questions, Specific or General.*] An English lady, domiciled in France, having a general power of appointment over a sum of Metropolitan Board of Works Stock, representing a share of proceeds of real estate in England sold under the judgment in a partition action—such proceeds being liable to be laid out in the purchase of land under sect. 34 of the Settled Estates Act, 1877—by her will in the French language gave "all her properties and chattels (*tous les biens et droits mobiliers*)" to T. absolutely:—*Held*, that the will must be construed as disposing of everything in the form of personal estate over which the testatrix had a general power of disposition; and that, the fund being personal estate in form (*Chandler* v. *Pocock* (15 Ch. D. 491; 16 Ch. D. 648)), it passed by the will.—An originating summons to obtain the opinion of the Court upon the construction of an instrument should state the questions categorically, and not in such general terms as, "who are or is entitled to" the property in question. *In re* Harman. Lloyd *v.* Tardy - - - - - - - 607

6. —— *Remoteness—Trust to Work out Gravel Pits and then Sell—Gift of Proceeds of Sale to Unascertained Class—Gift to Children of Testator for their Lives with Remainder to their Respective Children—Children of Child Dead at date of Will.*] A testator directed his trustees to carry on his business of a gravel contractor until his freehold gravel pits were worked out, and then to sell them, with power for his sons, or any of them, to bid at the sale; and he directed his trustees to hold the proceeds of sale in trust for such child or children of his "then living," and such issue living of any child or children then

WILL—*continued.*

deceased, as should, being a son or sons, attain twenty-one, or, being a daughter or daughters, attain that age or marry, in equal shares *per stirpes*. And he declared it to be his wish that, until such sale, his sons should continue to be employed in the business. The testator directed his trustees to hold all the residue of his real and personal estate upon trusts for sale and investment, and to divide the income thereof equally amongst all his children during their respective lives, and upon the death of any such child, whether before or after his own death, to hold the *corpus* whereof the income was or would have been payable to such child, upon trust for all or any the child or children of such child, who, being a son or sons, should attain twenty-one, or, being a daughter or daughters, should attain that age or marry, and if more than one in equal shares:—*Held*, that both the trust for the sale of the gravel pits and the trust declared of the proceeds of sale were void for remoteness:—*Held*, also, that the children of a daughter of the testator who was dead at the date of his will were not included in the residuary gift.—Decision of Kekewich, J., affirmed. *In re* Wood. Tullett *v.* Colville - - - - C. A. 381

7. —— *Specific Devise—Insufficient Description—Intestacy—Election.*] If it can be gathered from the words used, that a testator intended to give a particular property to a legatee, but owing to the testator having several properties answering the description in the will, it is impossible to say, either from the will itself, or from extrinsic evidence, which of these several properties the testator referred to, the gift fails for uncertainty, and the Court cannot, to avoid an intestacy, construe the will as giving the legatee the option of electing which property he will take.—*Duckmanton* v. *Duckmanton* (5 H. & N. 219) and *Tapley* v. *Eagleton* (12 Ch. D. 683) distinguished. Asten *v.* Asten - - 260

8. —— *Trust for Benefit and Advancement of Legatee—Discretion given to Trustee as to Application—Legatee absolutely entitled.*] A testator gave to trustees all his property upon certain trusts, and directed that certain specified sums of money should be invested for the benefit of his four sons on their attaining twenty-one, such sums to be applied as the trustees in their discretion might think fit; and he further directed that the sums specified should be very judiciously invested, as they were intended specially for the advancement in life of the respective recipients:—*Held*, that the sons were absolutely entitled to the legacies, freed from the exercise of any discretion on the part of the trustees. *In re* Johnston. Mills *v.* Johnston - 204

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